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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 731.

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT.

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS, RESPONDENTS.

No. 732.

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

BRIEF OF PETITIONERS.

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BRIEF OF PETITIONERS.

THE OPINIONS BELOW.

The opinion of the District Court (R. 654-664) is reported in 59 F. Supp. 84. The majority opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 682-698) is reported in 157 F. 2d 295 and the dissenting opinion of Circuit Judge Gardner (R. 698-709) is reported in 157 F. 2d 305.

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered September 25, 1946. (R. 709-711) The petition for writs of certiorari was filed on the 29th day of November, 1946 and was granted January 6, 1947. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U.S.C., Sec. 347 (a).

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of Section 1426 (b) and 1607 (c) of the Internal Revenue Code, together with the regulations issued thereunder, are set forth in Appendix A, infra, pp. 97 and 98.

STATEMENT OF THE CASE.

These actions were brought in the United States Court for the Southern District of Iowa by petitioners for refunds of social security and employment taxes with respect to the services of eleven orchestras which furnished music for public dances held at petitioners' ballrooms during the years 1940, 1941 and 1942. The cases were consolidated for trial in the district court (R. 48) and for hearing of the appeals in the Circuit Court of Appeals. (R. 675)

The leaders of the six orchestras involved in the *Bartels* case intervened in that action. (R. 20-36) Griff Williams, one of the interveners, is the same Griff Williams whose orchestra was involved in a case of *Williams v. United States*, 126 F. 2d, 129 (C.C.A. 7th, 1942), certiorari denied, 317 U.S. 655, 63 S. Ct. 52, 87 L. Ed. 527 (R. 329), wherein Williams, and not the establishments at which his orchestra played engagements, was held to be the employer of the members of his orchestra for social security tax purposes.

The leaders of the orchestras involved in the *Geer* case

did not intervene in that action. Their names are Al Menke, Les Hartman, Jimmy Barnett, Paul Moorhead, Blue Barron and "Doc" Lawson. (R. 289, 290)

The evidence upon the trial disclosed that the orchestras were traveling orchestras which the ballroom proprietors secured through negotiations with either booking agents or the leaders. (R. 312, 313) No negotiations were had with the members of the orchestra (R. 52, 312), known in the trade as "sidemen." (R. 448) These traveling orchestras usually held forth in single evening performances in what are known as "one night stands." (R. 331)

Each of the orchestras was organized and established as a permanent enterprise many years prior to its engagement for petitioners. (R. 70, 71, 132, 162, 259, 311 and 329) Each leader conducted his orchestra as an independent business and held himself out to the public as ready, able and willing to serve anyone who might desire engagements. (R. 126, 127, 259, 330 and 331) The name of each leader and his orchestra and his particular style of music was extensively advertised either by the leader or his booking agent. (R. 134, 259, 312, 339-341, Pltfs.' Ex. B-25, R. 261 and 260, Pltfs.' Ex. C, R. 403-414, 338) Each orchestra operated over a wide territory in which it was well known, having played engagements therein for various ballrooms, hotels, amusement parks, clubs, lodges, city fire and police departments, American Legion Posts, fairs, college groups, high school classes and civic organizations. (R. 71, 127, 162, 163, 259, 265, 330, 331 and 442)

The services of each orchestra consisted of the playing of popular dance music in a distinctive style, as developed and determined by the leader in order that his name and the name of his orchestra might acquire and maintain a reputation and receive public approval and acceptance throughout the territory in which it played.

(R. 73, 74, 131, 165, 253, 271, 281) The leader in the case of each orchestra selected the musicians, instrumentation and musical arrangements which he thought would enable the orchestra to produce, under his direction, the particular style of music he had in mind. (R. 131, 165, 271, 352) He trained and rehearsed the sidemen for the purpose of accomplishing this result, and in the playing of an actual engagement he led and directed them in the manner of their performance so as to make sure that they played the distinctive style of music by which the leader and his orchestra had become identified in the minds of the public. (R. 131, 132, 165, 276, 352, 353)

Prior to engaging each of the orchestras, petitioners were familiar with the reputation and special quality of music of each leader's orchestra. (R. 53, 54, 74, 312) In each instance petitioners relied on the leader of the orchestra to bring to their respective ballrooms an established organization composed of musicians selected and rehearsed by him and capable of performing the orchestra's distinctive style of music with which petitioners were familiar. The reputation and public acceptance of such "Name Bands" were the things which caused petitioners to agree to pay the price for the engagement demanded by the leader or his booking agent. (R. 54, 74, 313)

The sidemen of the orchestras were selected and hired by the leaders (R. 131, 132, 164, 270, 346, 347) and were discharged by the leaders. (R. 133, 164, 271, 349) Petitioners never hired or discharged any sideman of any of the orchestras and never had any conversation with any leader or sideman about hiring or discharging the latter. (R. 66, 73, 326, 327) Nor did petitioners believe that they had the right to discharge any sideman. (R. 66, 67)

The salary or wages of each sideman of an orchestra, the length and terms of his employment, were fixed and determined by the leader at the time he made his hiring

arrangement with such sideman (R. 136, 164, 272, 281, 346, 347), which was months and even years prior to the orchestra's engagement at petitioners' ballroom. (R. 132, 163, 270, 348, 349) Usually the compensation which the leader agreed to pay his sidemen was a flat weekly salary (R. 136, 158, 168, 272, 326) which the leader was bound to pay regardless of whether the orchestra played engagements. (R. 136, 151, 152, 272) Some of the leaders kept a written payroll record showing the names of the sidemen and the amounts of their weekly salary. (R. 137, 168, 281, and Pltfs.' Ex. B-1, R. 173, 170) The payment of the sidemen's compensation was in some instances made by means of a check drawn on the leader's bank account. (R. 136, 360, 361)

Petitioners never had any conversation with any leader or sideman of any orchestra regarding the compensation of the latter (R. 65, 73, 324), did not know the amount thereof or its manner of payment (R. 65, 73), and had nothing whatever to do with determining said amount. (R. 75, 98, 325, 326)

The gross contract price for each engagement was determined through barter negotiations between petitioners and leader or his booking agent. (R. 52, 73 and 266) This price was never paid by the petitioners to the sidemen but was always paid to the leader or his agent. (R. 60, 65, 75, 76, 135, 276, 322) The residue of the contract price after the leader's payment of the compensation of the sidemen and other expenses of the orchestra, such as commissions, traveling and miscellaneous expenses, belonged solely to the orchestra leader. (R. 138, 168, 277, 361, 362) In the event no residue remained and there was a loss on the engagement, the leader alone, and not the sidemen, stood such loss. (R. 138, 277, 362)

With respect to the performance of each orchestra engagement, the leader directed the sidemen, dictating such

matters as the style of music, its length, tempo and volume. (R. 55, 56, 73, 275, 315, 320, 321, 353-355) He owned the musical library of sheet music used by the orchestra, and designated the various selections to be played therefrom (R. 58, 73, 133, 165, 271, 272, 350), determined the instrumentation of the orchestra (R. 56, 73, 133, 165, 275, 315, 352), determined the number of sidemen in the orchestra (R. 54, 73, 132, 151, 152, 164), prescribed and furnished the form of attire worn by the sidemen (R. 135, 168, 275, 314, 357), provided the music racks and public address system used by the orchestra in playing the engagement (R. 56, 57, 73, 135, 166, 275, 276, 319, 356), provided and arranged for the means of transportation to and from the engagement (R. 74, 135, 166, 167, 276, 313, 357), determined the placing of the musicians on the bandstand (R. 314, 356), conducted rehearsals of the orchestra prior to the engagement (R. 134, 135, 165, 166, 276, 355, 356), and planned and directed the presentation of any featured numbers. (R. 134, 321, 355)

Petitioners never gave any directions or instructions, either oral or written, to the leader and sidemen of any orchestra (R. 108, 315, 319), nor did petitioners believe they had the right to give such directions or instructions. (R. 102, 103, 318)

All of the orchestra engagements except that of Griff Williams and his orchestra at the Crystal Ballroom on October 13, 1940, were "booked" through the use of what is known as the Form B contract. After the *Bartels* action was commenced defendant conceded in his answer that Griff Williams and his sidemen were not the employees of the Crystal Ballroom owners during this particular engagement. (R. 19)

The Form B contract above mentioned was a standard form of contract prepared by the American Federation of Musicians during late 1940 and early 1941 (Pltfs.' Ex.

B-37, R. 583, 585, 582) at a time when orchestra engagements under an earlier federation official form of contract (Pltfs.' Ex. A, R. 399, 348) were being litigated in *Williams v. United States*, supra.

An order of the International Executive Board of the Federation promulgated by James C. Petrillo, as president, prescribed the Form B contract as the form of contract required to be used for all orchestra engagements "for the purpose of protecting our members under the Social Security Laws." (Pltfs.' Ex. B-37, R. 587, 582) In another statement announcing this new form of contract, Petrillo said: "All members of the Federation of Musicians are herewith instructed that, at the expiration of their present contracts with hotels, cafes, restaurants, etc. this standardized form of contract be accepted and put into force, and from then on the contractor or leader will not be held responsible for the payments of social security tax on such engagements." (Pltfs.' Ex. B-37, R. 585, 582)

Although the Form B contract purported to cover an arrangement whereby an engagement was booked for the members and leader of the orchestra severally, no new or different arrangement or contract was made with booking agencies for the purpose of causing those arrangements to conform to the recitals of the contract. (R. 444, 445, 454, 455, 477) For example, the same identical contract between Griff Williams and Music Corporation of America remained in force and effect when both of the contracts for his different engagements at the Crystal Ballroom were made and when both engagements were played. (R. 454, 455, Pltfs.' Ex. N, R. 461-467, 455) This booking agency contract repeatedly refers to the employer-employee relationship between Griff Williams and the sidemen of his orchestra.

The Form B contract referred to the establishment owner as the "employer" and to the orchestra members,

including the leaders, as "employees." The place, date, hours of work, agreed lump sum price and time of payment were specified. The contract contained a recital that "the employer shall at all times have complete control of the services which the employees will render under the specifications of this contract." (R. 12-14)

Although the Form B contract further provided that the leader should list on the reverse side or on a separate memorandum to be supplied the establishment owner the amount paid sidemen and to take and turn over to the establishment owner their receipts therefor, this provision was seldom complied with. The sidemen's receipts were never given the petitioners. (P. 65, 73, 98, 325) No separate memorandum was ever given the Geers (R. 325), and in only one instance was such a memorandum given the owners of the Crystal Ballroom. (Pltfs.' Ex. A-1, R. 99, 100, 98) The only contracts in the *Bartels* case listing any information on the reverse side were the contracts for engagements by Buddy Fisher and His Orchestra and Tiny Hill and His Orchestra (R. 97), and in the latter instance such information is incomplete. (Pltfs.' Ex. S, R. 83, 85, 82, Pltfs.' Ex. T, R. 87, 89, 82) The only leader in the *Geer* case who consistently listed on the contract the sidemen's names, social security numbers and the purported wages was Paul Moorhead and, significantly, even in this instance the amounts of wages so listed did not correctly state the sidemen's actual compensation, the amounts specified being $5.00 a man for week day nights and $6.00 a man for Sundays (Pltfs.' Ex. B-6 to B-21, both incl. R. 177-251, 176) these sums being merely the union minimum scale (R. 325), whereas Paul Moorhead was paying his sidemen substantial sums above union scale during the period when the engagements were played. (R. 258)

When Roy Bartels, one of the petitioners, received one of the first Form B contracts from the booking agency

which booked a number of the engagements at his place, he objected to its provisions referring to him as the employer and was told by that agency to go ahead and sign it, that it was just a change that had been requested by Petrillo, and that it would not change his status a bit. (R. 116) Because of this fact and the fact that he knew by-laws of the American Federation of Musicians made a part of the Form B contract, referred to the leader as the employer of the sidemen, Bartels did not believe at the time he signed the Form B contract for an orchestra engagement that such contract made him the employer of the orchestra members (R. 116-118, 121, 122) even though he was aware that such contract contained other recitals to that effect. (R. 104) Bartels was also told by the above mentioned booking agency that unless he signed the Form B contract he could not get the orchestra. (R. 53)

The same orchestras which played the engagements that are involved herein and were booked through the use of the Form B contract had previously played at petitioners' ballrooms in engagements antedating the promulgation of the Form B contract. (R. 53, 70, 102, 311, 327, 334) The manner in which the orchestras operated and the conduct and practices of the parties were the same in the case of the engagements booked under the Form B contract as they were in the case of the engagements for petitioners prior thereto. (R. 102, 139, 253, 277, 327, 364, 365)

All of the leaders and sidemen of the orchestras involved in these actions were members in good standing of the American Federation of Musicians. (R. 653) The Form B contract contains an express provision making all of the rules, by-laws and regulations of that organization a part of the contract and it further provides that "nothing in this contract shall ever be so construed as to interfere with any obligation which they (member musicians) may owe to the American Federation of Musicians." (Par-

enthetical insertion ours). Both at the time the Form B contracts involved in these causes were made and the time the engagements specified therein were played, certain by-laws of the Federation which were previously adopted at its annual convention and officially published by its Secretary as effective for the current year contained a number of provisions obviously designed to protect the sidemen of orchestras against various practices of orchestra leaders as employers. (Interveners' Ex. 6, R. 594-599, 592, Interveners' Ex. 7, R. 540-544, 538) Many of these by-laws refer to the leader as employing the sidemen (Interveners' Ex. 6, R. 596, 598, 592, Interveners' Ex. 7, R. 541, 542, 538), and three of them expressly prohibit the sidemen from contracting with an establishment owner. (Interveners' Ex. 6, R. 596, 598, 592, Interveners' Ex. 7, R. 541, 542, 538) Oscar F. Hild, member of the union's International Executive Board, called as a witness by interveners, testified that under the powers granted him by Article I, Section 1 of the by-laws, James C. Petrillo, Federation President, took action to change these by-laws by issuing an order which he identified as a letter sent by Petrillo to all union locals, on May 1, 1941, advising them that after June 1, 1941 only the Form B contract could be used by orchestras in booking engagements. (R. 502-504, 579-582, p. 24 of Pltfs.' Ex. B-37, R. 587, 582) Article I, Section 1 of the by-laws, gives the union president power to issue an executive order which "may by its terms annul and set aside by-laws or any portion thereof." (Interveners' Ex. 7, R. 538) Although Petrillo's said letter of May 1, 1941, which was the only notice of the alleged by-law change ever given to the union locals and booking agencies (R. 590, 591), makes no mention of any by-laws and does not by its terms purport to annul and set aside any by-law or part thereof (R. 578, 579, Pltfs.' Ex. B-37, R. 587, 582), the sum and substance of the witness Hild's testimony was that he con-

sidered such letter together with the Form B contract as changing the by-laws in question. (R. 604) While Section 3 of Article I of the union's by-laws require the Secretary to publish in its official publication not later than July following adoption "all laws that have been amended, added to, or in any way changed" (Interveners' Ex. 7, R. 539, 538), the official copies of the by-laws edited and published by the Secretary in 1941 and again in 1942 contain the same verbatim by-laws as were claimed by the witness Hild to have been changed by Petrillo's said letter of May 1, 1941. (Interveners' Ex. 7, R. 541, 542, 538, Interveners' Ex. 6, R. 596, 592) In July 1944 the Secretary certified that the revision of one of these by-laws, being Section 29 of Article X, which prohibits an establishment owner from hiring the sidemen of an orchestra, was not intended to take effect until September 15, 1944. (R. 605, 606; pp. 12 and 14 of Pltfs.' Ex. B-38, R. 615, 617, 614)

The actions were tried to the court without a jury. The court on consideration of the evidence entered findings of fact (R. 662-663) as follows:

> "1. That at all times, and during the times of the performances by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control over their orchestras and the members thereof, and the method and manner of doing the work. Such leader exercised and had the exclusive right to hire and fire such members, to contract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances. Such leader organized, managed and controlled such orchestras as an independent organization for hire, and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes.
>
> "2. The contract, Form B, was not entered into by fair negotiation between the parties, but upon demand of the musician's union and the leaders of the

orchestras that it must be entered into or no orchestra could be obtained, and it was required to be so executed with the avowed purpose of protecting the leader from taxes as an employer. It was required by the leader to be entered into as an anticipatory arrangement to escape taxation. There was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestras, subsequent to June, 1941, or by reason of the Form B contract, than there was before that time, and the true relationship at all times as between the plaintiffs and such leaders was that the latter were independent contractors.

"3. At the time of the execution of the contracts, form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestras or any of the sidemen or the method or manner of doing its or their work in any particular.

"4. Considering all the facts and circumstances as disclosed by the evidence, including the contract Form B and its execution, none of the plaintiffs was at the time of the performance of the several orchestras on their premises the employer of the leader or of any of the members of the orchestras within the meaning of the Internal Revenue Statutes."

The district court on these findings concluded as a matter of law that the leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes and that none of the ballroom owners were the employers of the leader or any of the members of the orchestra within the meaning of such statutes (R. 663, 664), and accordingly entered judgments in favor of petitioners. (R. 664, 665)

After having the cases under advisement for more than

eight and one-half months from the date on which they were orally submitted, the Circuit Court of Appeals for the Eighth Circuit by a divided court reversed the judgments of district court and remanded the causes. (R. 698) The majority opinion held that the Form B contract with its provisions giving the right of control of the orchestra's services to the ballroom owners established on its face the legal relationship of employer and employee as it existed at common law. Thereupon the court further held that the evidence failed to show that it was the actual intention of the parties that such right of control should remain in the leader, and that inasmuch as the evidence did not show that the contract was subsequently abrogated by the parties, the employment relationship established by the contract remained unchanged. (R. 683-698)

Circuit Judge Gardner, who dissented, was of the opinion that the findings of the trial court, including its third finding that parties at the time of the execution of the Form B contract did not thereby intend to transfer the right of control of the orchestra's services from the leader to ballroom owners, were supported not only by substantial but abundant evidence. He took the position that the Form B contract at most was simply a circumstance to be considered in determining the relationship of the parties and did not preclude the trial court from considering other facts showing their real relationship. (R. 698-708)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

(1) In holding that petitioners were the employers of the leaders and members of the orchestras which performed engagements at petitioners' ballrooms within the meaning

of Section 1426 (b) and 1607 (c) of the Internal Revenue Code which define employment for social security and employment tax purposes.

(2) In holding that a written contract which purports to vest the right of control over the services in one of the parties conclusively establishes a relationship of employer and employee and precludes consideration of facts which clearly prove a relationship different than that ostensibly created by such contract.

(3) In substituting its findings of fact for those of the district court on the question of whether the parties actually intended that the right of control over the services of the orchestra members would be in the ballroom owners and not the leader.

(4) In holding that a person who is admittedly an employer under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act may shift to another the tax burdens imposed on him as such employer by the simple device of merely changing the wording of their written contract without any other factual change in their relationship.

(5) In holding that certain by-laws of the American Federation of Musicians recognizing the leader as the employer of his sidemen and prohibiting the existence of an employment relationship between them and the ballroom owners were not a part of the Form B contracts involved in these actions.

(6) In holding that the terms of the Form B contract were sufficient to create the relationship of employer and employee between the ballroom owners and the leaders and members of their orchestras.

SUMMARY OF ARGUMENT.

The decision of the district court that the leaders of the orchestras were independent contractors and that they, and not the ballroom owners, were the employers of the sidemen of their respective orchestras within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act was based on findings of fact which the Circuit Court of Appeals could not disturb unless clearly erroneous. A finding of fact is clearly erroneous only when it is not supported by substantial evidence or is arrived at by the application of a wrong principle of law.

The only finding of fact which the Circuit Court of Appeals set aside was the one wherein the district court found that the leaders, and not the ballroom owners, had the right of control over the members of their orchestras and the method and manner of doing the work. This finding was not arrived at by application of a wrong principle of law for two reasons, as follows:

(a) The trial court followed the well settled rule that the court in determining who, as employer, is liable for social security and employment taxes, should not confine itself to the terms of a written contract between the parties but should consider all relevant facts and circumstances which tend to show the actual and true relationship. The authorities uniformly establish that, in determining the status of parties for tax purposes, the terminology of their written contract is of little weight or consequence as compared to the actual facts showing their true relationship. The district court in applying this rule considered not only the Form B contract but also such evidentiary factors, among others, as who directed and controlled the performance of the orchestra members in the playing of

an engagement, who had the right to hire and fire such members and fix and determine the amount and manner of the payment of their compensation, whether the leader was engaged in an independent business for profit, and whether there was any change in the conduct and practices of the parties after the advent of the Form B contract. The Circuit Court of Appeals, in disregarding these factors, as well as others shown by the record to exist in the present cases, and basing its determination solely on the provisions of Form B contract purporting to fix the relationship of the parties, applied an erroneous rule of law and its decision is therefore in error and should be reversed by this court.

(b) The Form B contract was one admittedly devised for the purpose of avoiding liability for social security and employment taxes not accompanied by any change in the actual relationship of the parties. Contracts of this nature are universally condemned and disregarded by the courts.

The district court's finding of fact with respect to the right of control was supported by not only substantial but also abundant evidence consisting of facts as follows:

(1) The leaders, and not petitioners, actually exercised control of the means and manner of performance of the members of their orchestras. (2) The leaders, and not petitioners, had the exclusive right to hire and discharge the members of their orchestras. (3) The leaders, and not petitioners, determined the amount of wages of the sidemen of their orchestras and its manner of payment. (4) The leaders were each engaged in an independent business for profit. (5) The leader of each orchestra, and not petitioners, furnished the tools (except the piano) with which the work was done. (6) The parties operated in the

same manner after the adoption of the Form B contract as before. (7) Petitioners justifiably believed that the Form B contract did not change their status with respect to the orchestras. (8) No change was made in the Union by-laws made a part of the Form B contract, which by-laws clearly show that the parties intended that the orchestra leader, as an independent contractor, would be the employer of the sidemen. (9) The Form B contracts were not writings evidencing a meeting of minds of the parties arrived at through fair negotiations. (10) Petitioners had not the necessary musical knowledge and skill to direct and control the means and manner of the performance of the sidemen.

The accumulative effect of the foregoing evidence is overwhelming proof that the leaders had and exercised the right of control over the orchestra members, and the decision of the Circuit Court of Appeals setting aside the district court's finding on that question is, therefore, in error and should be reversed by this court.

The Circuit Court of Appeals erred in substituting its findings of fact for those of the district court on the question of whether the parties actually intended that the right of control over the services of the orchestra members should be in the ballroom owners and not the leader. What the parties actually intended was solely a question of fact to be determined from all the evidence and the trial court's finding on that question being supported by substantial evidence, the Circuit Court of Appeals was without the power to substitute its own contrary finding.

The Circuit Court erred in basing its decision entirely on the assumption that the terms of Form B contract had the legal effect of vesting in the ballroom owners the right to control the means and manner of the performance of the orchestra members for the reason that the contract

at most granted the ballroom owners control only over the results to be accomplished and not the details of the work and its manner of performance. Moreover the contract does not even purport to divest the leader of other characteristic controls of an employer.

ARGUMENT.

I.

To determine who, as employer, is liable for social security and employment taxes, the court should not confine itself to the terms of a written contract between the parties but should consider all relevant facts and circumstances which tend to show their actual and true relationship.

A.

In determining the status of parties for tax purposes, the terminology of their written contract is of little weight or consequence as compared to the actual facts showing their true relationship. Courts disregard terminology in a written contract which does not square with the actual facts.

Both the district court and the Circuit Court of Appeals agree that in order to constitute an employment within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and the regulations issued thereunder, the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them, and that an independent contractor is not an employee. Their point of difference arises with respect to the factors which a court may consider in determining such relationship in a case where the written

contract of the parties purports by appropriate terminology to fix their status as that of employer and employee. The trial court, following what it considered to be the rule laid down in numerous cases hereinafter mentioned, held that the contract was not conclusive of an employer-employee relationship but merely, "an element that may be considered by the fact finder if of any assistance in determining what is the true relationship." (R. 660) Circuit Judge Gardner concurs in this holding. (R. 708) The majority opinion (R. 689) takes a contrary view and holds that the parties' written contract, because it "obligationally gives complete control of the services which one person agrees to perform for another to the person for whom the work is done" establishes on its face the legal relationship of employer and employee as it existed at common law, thereby precluding a court's consideration of other factors which show that their actual relationship was that of independent contractor.

Petitioners believe this is the first case involving the performance of services by one person for another in which any court has ever held that the parties' written contract is the sole test by which the relationship of employer and employee is to be determined. This holding is directly contrary to the view taken by the American Restatement of the Law of Agency and unanimous decisions of courts which have had occasion to consider the question. Section 220 (1) of such Restatement, Volume I, page 483, defines a servant "as a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." Section 220 (2) states:

> "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered. * * *"

The section then lists *nine evidentiary factors* of which the parties' agreement respecting control over the details of the work is only one. Other facts listed as equally important are such matters as whether the person performing the services is engaged in a distinct occupation or business, the skill required in the particular occupation; the method of payment, who furnished the tools with which the work was done, and whether or not the parties believe they are creating the relationship of master and servant. These are among the very factors which the district court considered in making its findings (R. 662, 663), most of which are not even questioned by the majority opinion. That the trial court, in doing this, acted correctly is further shown by the Agency Restatement's comment on Section 220, page 484, as follows:

> "The relationship of master and servant is one not capable of exact definition. * * * *The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship.*" (Italics ours.)

The Agency Restatement's rule that the status of employer and employee is not to be judged by the single evidentiary factor of the parties' form of contract but by an overall view of all the facts and circumstances showing their true relationship is sustained by the decisions of courts in the following cases, wherein members of an orchestra were held to be the employees of the leader and not the establishment owner for social security employment tax purposes:

Spillson v. Smith, 147 F. 2d 727 (C.C.A. 7th).

Williams v. United States, 126 F. 2d 129 (C.C.A. 7th) certiorari denied, 317 U. S. 655, 63 S. Ct. 52, 87 L. Ed. 527.

Palmer v. Michigan Unemployment Compensation Commission, 310 Mich. 702, 18 N.W. 2d 83.

Nebraska National Hotel Co. v. O'Malley, 63 F. Supp. 26 (Neb.).

In re Jermyn Hotel Company, (Pa. Common Pleas, Sept. 3, 1946) C. C. H. Unemployment Ins. Service, Pa. par. 8149.

In the last two cases above cited, which involved orchestra engagements under the same Form B contract as that involved herein, the court cited with approval the decision of the district court in the present cases.

The rule applied in the foregoing orchestra cases is supported by the uniform decisions of courts in social security and unemployment tax cases generally.

Matcovich v. Anglim, 134 F. 2d 834, (C.C.A. 9th) certiorari denied, 320 U.S. 744, 64 S. Ct. 46, 88 L. Ed. 441.

Anglim v. Empire Star Mines Co., 129 F. 2d 914 (C.C.A. 9th).

Wabash R. R. Co. v. Finnegan, 67 F. Supp. 94 (E. D. Missouri).

Royal Theatre Corporation v. United States, 66 F. Supp. 301 (Kan.).

Willard Sugar Co. v. Gentsch, 59 F. Supp. 82 (N.D. Ohio).

Jack and Jill, Inc. v. Tone, 126 Conn. 114, 9 Atl. 2d 497.

In re Morton, 284 N.Y. 167, 30 N.E. 2d 369.

Industrial Commission v. Northwestern Mutual Life Ins. Co., 103 Col. 550, 88 P. 2d 560.

In the last case above cited, the Supreme Court of Colorado held that the written contracts between the defendant company and its agents would be considered a "slight element" in determining the nature of their relationship.

The rule is also sustained by the following decisions in workmen's compensation and tort cases:

Gulf Refining Co. v. Brown, 93 F. 2d 870 (C.C.A. 4th).

Bertino v. Marion Steam Shovel, 64 F. 2d 409 (C.C.A. 8th).

Sanford v. Goodridge, 234 Iowa 1036, 13 N. W. 2d 40.

Glielmi v. Netherland Dairy Company, 254 N. Y. 60, 171 N. E. 906.

Nestle's Food Co. v. Industrial Commission, 205 Wis. 467, 237 N. W. 117.

Brown v. Industrial Accident Commission, 174 Cal. 457, 163 Pac. 664.

Further support for the rule is found in the recent decision of the Seventh Circuit Court of Appeals in the case of *Hargis v. Wabash R. R. Co.*, 12 Labor Cases 70, 327 (decided January 16, 1947) where the question was whether the plaintiff was an employee of the defendant under the Fair Labor Standards Act. The district court held that he was not such an employee because he had voluntarily entered into a written contract defining his status as that of independent contractor. In reversing this holding, the Circuit Court said:

> "In *Kehrer v. Industrial Commission*, 365 Ill. 585, the court said:
>
> > 'It is impossible * * * to lay down a rule by which the status of men working and contracting together can be accurately defined in all cases as employee or independent contractors. Each case must depend on its own facts and ordinarily no one feature of the relation is determinative but all must be considered together.'
>
> "Certainly the nature of the relationship cannot be determined alone by the use of the term 'independent contractor' in the agreement of the parties. If it could employers might in many cases easily escape the re-

sponsibility imposed upon them by employer liability acts through the simple device of requiring each employee to enter into a contract such as that used in this case. • • •

"Tested by the ordinary common law rules, we think the court should not have held, merely because of the language of the written instrument, that the relationship between Hargis and the Wabash Railroad was that of independent contractor and not that of employer and employee."

While this court has not previously had occasion to apply the rule in a social security tax case, it has repeatedly held that in tax matters generally a trial court may disregard the terminology of the parties' written contract and base findings on circumstantial evidence showing the substance of the transaction or relationship to be different from that portrayed in such contract.

Commissioner v. Tower, 327 U.S. 280, 66 S. Ct. 532, 90 L. Ed. Adv. Ops. 559.

Moline Properties, Inc. v. Commissioner, 319 U. S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499.

Griffiths v. Commissioner, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319.

While it so happens that in each of the above cases the rule was applied in favor of the government, there is nothing in the court's opinion to indicate that the rule is so limited, and in *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755, this court did not hesitate to apply the same rule in favor of the taxpayer.

The Treasury Department, through the regulations and rulings of the Commissioner of Internal Revenue promulgated under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, has itself repeatedly recognized the rule so universally recognized by the foregoing authorities and applied by the trial court in the pres-

ent cases. Section 402.204 of the Commissioner's Regulations 106 relating to the former enactment and Section 403.204 of his Regulations 107 relating to the latter enactment each state:

> "Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.
>
> "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent or independent contractor."

It is clear from the above regulation that if, as the district court found, the relationship of employer and employee existed in fact between the leader and the sidemen of each of the orchestras in the present case, it is wholly immaterial that the Form B contract designates and describes such relationship as that of fellow employee.

In S.S.T. 336 (C.B.1938-2, 295) the Bureau of Internal Revenue again referred to the same rule in language as follows:

> "The fact that a contract of employment provides that individuals engaged by an employee to assist him in the performance of his duties shall be his employees and not those of his employer *is not conclusive in determining the status of such individuals under the taxing provisions of the Social Security Act.* Such a provision ordinarily has no greater effect than a general provision contained in many contracts describing the relationship of the parties as something other than that of employer and employee although such relationship actually exists." (Italics supplied)

Singularly enough, the Bureau has even actually had occasion to apply the rule in determining the relationship between a leader and the members of his orchestra and the

establishment owner purchasing its services. This clearly appears from the Bureau's statement in S.S.T. 375 (C.B. 1939-2, 280) dealing with the social security tax status of B, an orchestra leader, and the musicians engaged by him, as follows:

> "The reference made in the contracts to the 'purchaser' as the 'employer' does not affect the situation and the *true relationship must be determined in the light of all the facts.*" (Italics supplied)

Finally, the Treasury Department has now conceded that the Form B contract's provisions are not conclusive of the relationship of the parties in the present cases. This clearly appears from the statement on page 8 of the Collector's brief in opposition to petition for writs of certiorari, as follows:

> "Although contractual provisions, such as are here involved may, unless 'abrogated' within the meaning of the law of contracts, be binding on the parties, we do not believe that the criterion is necessarily the same so far as the Government or a third party is concerned. The Government may treat such a contract as prima facie controlling, even if not conclusive, and it is certainly a fact to be taken into consideration along with other factors in reaching a decision."

If the parties' contract is not conclusive, but merely "a fact to be taken into consideration along with other factors in reaching a decision", in a case where the government claims that the contract is not determinative of a relationship for tax purposes, sound logic requires the application of the same rule in the converse situation, i.e., where one of the contracting parties claims as against the government that the contract is not decisive of a relationship for tax purposes. This is true because what Congress, in enacting the Federal Insurance Contributions and Federal Unemployment Tax Acts, has ordered taxed is the relationship of employer and employee in fact and its mandate

is binding on the government and private parties alike and hence cannot be changed by a mere form of contract. This is precisely the reason which prompted the Third Circuit Court of Appeals in *Tex-Penn Oil Co. v. Commissioner*, 83 F. 2d 518, to hold that a party to a contract reciting it had received $350,000 cash from the other contracting party as consideration for the transfer of corporate assets could show that the payment was not such consideration in fact notwithstanding the Commissioner's contention that the contract was conclusive. The court on this point said:

> "' * * the rule is well settled that in determining tax liability tax authorities must look through form to fact and substance."

On appeal to this court the decision of the Circuit Court in the above case was affirmed. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 57 S. Ct. 569, 81 L. Ed. 755. After quoting the finding of the Board of Tax Appeals on the consideration question, this court said:

> "The validity of the ultimate finding above quoted is to be tested by what in fact was done rather than by the mere form of words used in the writings employed. *United States v. Phellis*, 257 U. S. 156, 168, 66 L. Ed. 180, 182, 42 S. Ct. 63; *Curran v. Commissioner of Internal Revenue*, (C.C.A. 8th) 49 F. 2d 129, 131."

Other decisions applying the same rule in favor of a taxpayer and against the Commissioner in social security and income tax cases are as follows:

Anglim v. Empire Star Mines Co., supra.

Spillson v. Smith, supra.

American Crystal Sugar Co. v. Nicholas, 124 F. 2d 477 (C.C.A. 10th).

Curran v. Commissioner, 49 F. 2d 129 (C.C.A. 8th).

United States v. Title Guarantee & Trust Co., 133 F. 2d 990 (C.C.A. 6th).

Circuit Judge Gardner, who wrote the dissenting opinion, concluded that the rule so universally sustained by the authorities was directly applicable to the present cases. In this connection he said (R. 701, 702):

> "The government, to be sure, was not a party to this contract, and if it did not in fact create or change the relationship of the parties it should not be of controlling effect. The trial court took it into consideration together with all the evidence and circumstances and found that it did not change the relationship of the parties as it had theretofore existed, and that the orchestra leaders were the employers of the musicians, and were independent contractors so far as the ballroom owners were concerned. None of the sidemen or musicians, aside from the leaders, executed any of the contracts, and the contract terms designating or giving appellation to a relationship in form created by them, are not in any sense conclusive. Parties can not by the use of legal terms make impotent the legislative arm of the government. The actual facts, not the names or terminology employed, must govern. (citing cases) • • • This principle or rule is particularly pertinent in tax matters. Taxation is a practical matter dealing with realities and the power of taxation is not to be restricted by mere legal fictions, but substance rather than form controls in applying tax laws." (Parenthetical insertion ours)

The majority opinion, while recognizing the general rule announced in the foregoing cases, holds that it is limited only to contracts containing general recitals and descriptive references and does not apply to a contract containing express obligations. (R. 691, 692) There is no foundation whatever for this novel view of the limited scope of the rule. In the first place, neither the Restatement of the Law of Agency nor any of the decisions sustaining the rule make any such distinction. In the second place, many of these decisions were in cases involving contracts which, in addition to containing general recitals and descriptive references, also contained clauses creating express obliga-

tions. For example, in *Spillson v. Smith, supra,* where the question was whether an establishment owner was the employer for social security tax purposes of an orchestra performing engagements under an earlier form of union contract, such contract provided that the establishment owner "was the employer to whom the musicians were directly responsible" and "any payment by the employer to the musicians' representative shall be as their agent for distribution among them." The lower court, like the district court in the present cases, refused to regard the written contract of the parties as conclusive, and upon examination of the actual facts found that the leader and not the establishment owner, was the employer of the members of the orchestra. On appeal, the Seventh Circuit Court of Appeals affirmed, saying:

> "The law is well established that the employer-employee relationship is to be judged by the presence or absence of no single evidentiary factor, but by an overall view, *Anglim v. Empire Star Mines Co.*, 9 Cir., 129 F. 2d 914, 917."

In *Anglim v. Empire Star Mines Co. Ltd., supra,* the question was whether miners performing services for a mine owner under a written lease agreement were employees of the latter for social security tax purposes. This agreement gave the owner the right to inspect the work, the right to require the discharge of objectionable workmen, and the right to furnish the tools with which the work was done. The court, after examining the conduct of the parties in practice, held that the miners were not the employees of the mine owner notwithstanding the provisions of the written lease.

Matcovich v. Anglim, supra, involved a contract reciting that so called "licensees" were not employees and were not subject to the control of the licensor. The district court held that, notwithstanding these recitals, the so-called

"licensor" had the right of control. On appeal this holding was affirmed.

In *Royal Theatre Corporation v. United States, supra,* the plaintiff corporations sought to fix their relationship with one Fite by a contract which expressly provided that the corporations should have no control over Fite with respect to his time or activities and that he was not to be an employee of the corporations. In refusing to treat such contract as decisive of the relationship, the court said:

> "The usual criteria for determination of the existence of the employer-employee relationship may become of slight assistance when the taxpayer shrouds that relationship in a cloak of artifice and fiction. Before such tests can be applied, the cloak must be removed and the subject viewed in naked reality. Contractual fictions, like the corporate form, may be subjected to the penetration of thorough judicial inquiry."

Similarly, in at least five other cases cited above, *Gulf Refining Co. v. Brown, Willard Sugar Company v. Gentsch, Wabash R. R. Co. v. Finnegan, Nebraska National Hotel Co. v. O'Malley,* and *In re Jermyn Hotel Company,* the contract between the parties contained an express provision dealing specifically with the right of control over the services rendered. Yet in each case the court went beyond the contract and determined the true relationship on the basis of all the facts and circumstances showing who in fact had the right of control over the work being done.

In *Williams v. United States, supra,* the Seventh Circuit Court pointed out that while the orchestra contracts were some evidence that Williams was not the employer, "they too, however, must give away to more decisive and persuasive circumstances." The court then enumerated the additional "decisive and persuasive circumstances" which a court may take into account in determining who has the

right of control over an orchestra's services. The court said:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work (*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *Densby v. Bartlett*, 318 Ill. 616, 149 N.E. 591, 42 A.L.R. 1406), the method and determination of the amount of the payment of the workmen (*Simonton v. Morton*, 275 Pa. 562, 119 A. 732), whether or not the person doing the work is engaged in an independent business or enterprise and, particularly, whether he stands to make a profit on the work of those working under him (*Barnes v. Myers*, 163 Md. 206, 161 A. 279, *Petzold v. McGregor*, 92 Ind. App. 528, 176 N.E. 640), which party furnishes the tools or materials with which the work is done (*Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440), and who has control of the premises where the work is done. *Murphy v. Herold Co.*, 137 Wis. 609, 119 N.W. 294."

Petitioners here point out that the five factors above mentioned by the Seventh Circuit Court of Appeals are the very factors to which the trial court in the present cases gave consideration, and with respect to all but one of them (control of the premises where the work was done) it found in favor of petitioners in findings which are not questioned by the court below. Surely it cannot be the law that these factors cease to have a bearing on the right to control simply because the parties attempt through the use of legalistic fiction in a form of written contract to define who, as between them, possesses such right. Take for example the right to hire and discharge the workmen. The Seventh Circuit Court of Appeals, at a later point in its opinion in the *Williams* case (p. 133 of 126 F. 2d), speaking of this right, said:

> "It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer * * * Without this right there could be no effective control by an employer."

Does this right to hire and discharge in one person suddenly lose its potency as affecting the right of control in that person simply because a form of contract purports to place such control in someone else? A realistic view of the situation in the present cases requires that this question be answered in the negative. It was only through the exercise of this power to hire and fire, which the trial court on undisputed evidence found the leader possessed, that the latter could enforce his right to control the sidemen in the discipline, coordination of effort and standardization of performance necessary to produce a marketable musical entertainment which was what the leader was in business to sell. The possession of such power was just as real and vital to his right of control after the Form B contract as it was before. The same thing is true with respect to the other factors such as the right to fix, determine and pay the wages of the sidemen, the fact that the leader was engaged in an independent business for profit and furnished the tools with which the work was done. The majority opinion, as Judge Gardner in his dissenting opinion points out, "brushes aside the findings of the trial court" regarding these matters "and bases its conclusion upon the single fact that there was in form a contract which purported to fix the relationship of the parties." (R. 708) Under the unanimous view of the authorities, this was clearly error on the part of the Circuit Court warranting reversal of its decision by this court.

B.

Contracts devised for the purpose of avoiding liability for social security and employment taxes not accompanied by a change in the actual relationship of the parties are condemned and disregarded by the courts.

The district court found that the execution of the Form B contract was devised by the musicians' union with the avowed purpose of protecting the leader from taxes as an employer and that "it was required by the leader to be entered into as an anticipatory arrangement to escape taxation." (R. 663) Before considering the Circuit Court's holding on this phase of the cases, we now direct attention to the abundant evidence supporting this finding.

The case of *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th), was commenced on May 15, 1940. While this litigation was in progress the American Federation of Musicians spent many weeks in the preparation of a new standard form of contract known in this record as the Form B contract (Pltfs' Ex. B-37, R. 583, 582) from which it may be inferred that the Federation was anticipating an adverse decision in the *Williams* case. On May 1, 1941, a copy of this new Form B contract was sent to each local of that union, along with a letter from James C. Petrillo, President of the Federation, stating that it must be used on all engagements on and after June 1, 1941, "for the purpose of protecting our members under the Social Security Laws." (See p. 24 of Pltfs' Ex. B-37, R. 587, 582) An order of the International Executive Board instructing officers of locals and members regarding its use further states: "All officers of locals and all members are required to adhere strictly to this order, as this is the only means by which we can help protect the interest of the members under

the Social Security Laws of the United States." (R. 582, Pltfs' Ex. B-37, R. 587, 582) That an anticipatory arrangement in the form of a written contract for the purpose of relieving leaders from the burden of paying social security taxes on wages paid by them to their sidemen was what the Executive Board of the Union had in mind in using the above quoted language is made unmistakably plain by President Petrillo's statement on page 18 of the May 1941 issue of the International Musician, the Union's official journal, as follows:

> "In accordance with these conclusions all members of the American Federation of Musicians are herewith instructed that, at the expiration of their present contracts with hotels, cafes, restaurants, etc. this standardized form contract be accepted and put in force, and from then on the contractor or leader will not be held responsible for the payment of social security tax on such engagements." (Pltfs' Ex. B-37, 585, 582)

During the time when the Union's counsel was drafting the Form B contract there were three conferences between the Union's counsel and Petrillo and Treasury Department attorneys regarding the terms and provisions of that contract and the subject generally of "who was to be recognized as employer." (R. 575, 577, 578)

Petitioners here point out that other trial courts, presented with a like record of like purpose of a standard form of musician's union contract have made the same finding as did the district court in the instant cases. Judge Donohoe in *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Neb.), found that "the Form B contract was obviously entered into in an effort to shift the legal responsibilities imposed by the statutes . . . " (See Findings of Fact filed November 13, 1945). And in *Spillson v. Smith*, (N. D. Ind.) C.C.H. Unemployment Insurance Service, Vol. I, Par. 9111, affirmed 147 F. 2d 727 (C.C.A. 7th) wherein were involved the same facts as those in the pres-

ent case, except that the contract which was passed on was the form of contract devised by the American Federation of Musicians just preceding the Form B, the district court found that:

> "* * * it was apparent that the contract admitted in evidence and marked Plaintiff's Exhibit B, which was a printed form and prepared by the union, and was the standard form of contract provided by the union, was changed from the terminology used in the contract identified as Plaintiff's Exhibit "A" in an obvious effort to avoid liability on the part of the orchestra leaders for the payment of Social Security and Employment taxes."

The record in the present cases further shows that all of the orchestras had played engagements at petitioners' ballrooms prior to the Form B contract, (R. 53, 70, 311) and that every one of the leaders who testified stated that there was no difference or change in their relationships with the petitioners or in their manner of performance of the engagements after Form B contract came into use from that which existed prior to the Petrillo edict requiring the use of such contract. (R. 139, 253, 277, 364, 365, 392, 393, 397) The petitioners each testified to like effect. (R. 67, 102, 327) No witness for defendant or intervenors controverted that testimony or claimed in any manner that there was a single change in actual practices resulting from the use of the Form B contract, and the Collector, with commendable frankness, has admitted in his brief (p. 6) in opposition to the petition for writ of certiorari that "the subsequently established record in this case indicated that the new contract did not in fact result in any change in the conduct of the business, or the exercise of actual control over the musicians exclusively by the leader."

Wherever the evidence establishes motivation for a contract like or similar to that provided by the record in this case, and the conduct of the parties after such contract

remained unchanged from what it was before, the courts have made short shrift of contentions that such a contract is conclusive proof of the true relationship of the parties. This court rejected just such a contention in *Commissioner v. Tower*, 327 U. S. 280, 66 S. Ct. 532, 90 L. Ed. Adv. Ops. 559, where the question was whether a written agreement was conclusive evidence of a partnership relation between a husband and wife for income tax purposes. This court, speaking through Mr. Justice Black, said:

> "Before the partnership the husband managed, controlled, and did a good deal of the work involved in running the business, and he had funds at his disposal which he either used in the business or expended for family purposes. The wife did not contribute her services to the business and received money from her husband for her own and family expenses. After the partnership was formed the husband continued to control and manage the business exactly as he had before. The wife again took no part in the management or operation of the business. * * * Consequently the result of the partnership was a mere paper reallocation of income among the family members. The actualities of their relation to the income did not change. There was, thus, more than ample evidence to support the Tax Court's finding that no genuine union for partnership business purpose was ever intended and that the husband earned the income."

An earlier case by this court laying down the same general rule and one strongly relied on by the district court in the present cases, is *Griffiths v. Commissioner*, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319, wherein this court found that "a lawyer's ingenuity devised a technically elegant arrangement whereby an intricate outward appearance was given to the simple sale from Griffiths to Lay and the passage of money from Lay to Griffiths." Similarly, the history of the Form B contract and the unchanged conduct of the parties under it unmistakably stamp that contract as a "technically elegant arrangement" ingeniously devised to

give an outward appearance of employer and employee relationship to what is in fact an independent contractor relationship. This court's statement in the *Griffiths* case that "Taxes cannot be escaped by anticipatory arrangements and contracts however skillfully devised" is equally applicable in the cases at bar and the district court properly so held.

In *Doll v. Commissioner*, 149 F. 2d 239, which was a family partnership case, the Eighth Circuit Court laid down the same rule as this court in the *Tower* case. Speaking through Judge Stone, the court said:

> "We have here a written instrument which is sufficient to create a partnership, both at common law and under Missouri decisions. *Schneider v. Schneider*, 347 Mo. 102, 146 S. W. 2d 584; *Stone v. Guth*, 232 Mo. App. 217, 102 S. W. 2d 738. The judgment here is at most an adjudication of what was never in doubt. The existence of such a contract is not determinative of this tax issue. There remains the impact of the test of an analysis of 'all the circumstances attendant on its creation and operation.'".

After reviewing "all the circumstances attendant on its creation and operation", Judge Stone concluded his opinion as follows:

> "The manner of operation of his business preceding and during the years of this contract was consistent with a conclusion that this contract did not make any substantial change in his (this petitioner's) economic position."

The court's attention is directed to the fact that Circuit Judge Gardner was of the opinion that the rule announced by the court in the *Doll* case was equally applicable to the cases at bar. (R. 704)

The same application of the rule in question has been made in social security and employment tax cases. One of the most recent of such cases is *Tomlin v. United States*,

(N. D. Cal. January 2, 1947) C.C.H. Unemployment Insurance Service, Vol. I, Par. 9280, where the question was whether supervisors performing services pertaining to the distribution and operation of plaintiff's vending machines were its employees for social security and employment tax purposes. Plaintiff contended that such supervisors were independent contractors because of their execution of certain lease agreements drawn up by an attorney for the express purpose of giving them that status. The court in denying this contention pointed out that "subsequent to the signing of these agreements, the signatory parties continued functioning the same as before." It therefore characterized the lease agreement as an "attempt to arbitrarily create a status which in fact was non-existent."

In *McDermott v. Henrickson*, 45 F. Supp. 277 (S. D. Wash.) the owner of a barbershop attempted to create, through the execution of written leases with barbers working in his shop, the relationship of landlord and tenant. In holding this attempt ineffectual, the court said:

> *"The subleases prepared by plaintiff disclose much legal ingenuity and acumen.* * * *
>
> "However, in the court's opinion his ingenuity, ability and study cannot convert what was in fact employment to subtenancies and independent business. It is not the form but the substance which controls.
>
> "What was originally employment and so intended and admitted by plaintiff and the barbers cannot be completely altered into something else by a mere matter of nomenclature. There is no substantial difference between the actual terms and conditions of employment during the period plaintiff admits the barbers were employees and the actualities under the so-called subleases except with regards to the names used and the alleged time required for terminating the relationship." (Italics supplied)

In *Electrolux Corporation v. Board of Review*, 129 N. J. L. 154, 28 A. 2d 207, where it appeared that the parties' contract had been changed without any change in the factual relationship, the court said:

> "It is conceded that the writing was designed to remove appellant's salesmen from the category of employees governed by the Unemployment Compensation Act, supra. But it was ineffectual as such. * * * There were provisions obviously intended to invest them with the status of independent contractors. *Yet the change was of the form rather than the substance so far as control was concerned—one whose sole motivation was evasion of the cited statute without an alteration of the essence of the relationship.*" (Italics supplied)

The Circuit Court majority opinion admits that prior to the Form B contract "a leader had been held to be an independent contractor and to be liable for the payment of Social Security Taxes on his orchestra-members." (R. 688) As above stated, the undisputed record evidence shows, and the collector has now admitted, that, except for the change in the form of the contract, the facts and circumstances relating to the orchestras and their engagements booked under the Form B contract were the same as before that contract was devised. The correctness of the majority opinion must therefore stand or fall on the bare proposition that even though there was no material factual difference in the true relationship of the parties, the mere existence of a written contract skillfully and adroitly devised to cause a shifting of a tax burden, without any change in the actual relationship of the parties, requires a court to conclude that a new and different taxpayer is the employer. That is exactly what the courts have consistently refused to do, and, as said by the court in the *McDermott* case, supra, an original relationship once established "cannot be completely altered into something else by a mere matter of nomenclature."

1. *The Reasons Given by the Circuit Court for Its Holding That the District Court Could Not Disregard the Form B Contract as a Tax Avoidance Device Are Not Sustained by Either the Facts or Applicable Rules of Law.*

Nothing contained in the majority opinion of the court below indicates that it gave any consideration whatever to the rule of the cases last above cited or the facts of this record which bring the Form B contract squarely within it. The opinion, while admitting that the purpose of the contract "was to shift as nearly as possible the social security tax burden previously borne by a leader on his orchestra-members to those engaging the services of the orchestra" (R. 687), nevertheless holds that the trial court was not on that account entitled to disregard the provision therein respecting control of the orchestra's services. The first reason given by the court, that the contract does not operate to deprive the government of any taxes which it would otherwise have received, is refuted by at least two undisputed record facts, the first of which is that the orchestras in the cases at bar, like all traveling orchestras, play many engagements for civic, charitable, educational and similar organizations. (R. 71, 127, 162, 163, 259, 330, 331, 442) If these organizations, and not the leaders, are held to be the employer of the sidemen of the orchestra (which would be the result under the decision of the court below), not one penny of social security and employment tax will be paid on the sums paid the sidemen performing such engagements for the reason that Sections 1426 (b) (8) and (b) (10), Sections 1607 (c) (8), (c) (10), and 101 (6), (7), (8), and (9) of the Internal Revenue Code expressly exclude charitable and educational institutions and pleasure, business and civic clubs from coverage under the Federal Insurance Contributions and Federal Unemployment Tax Acts.

The second fact to which petitioners have reference is the fact that in the present case the only three leaders who ever bothered to furnish the ballroom owners any listing of the sidemen and their pay on the reverse side of their Form B contract, as required by its terms, each misstated and understated the actual compensation of the sidemen. While the filled-in amounts on the reverse side of Paul Moorhead's contracts (Pltfs.' Exs. B-6 to B-24, both incl., R. 177-251, 176) and on the reverse side of Al Menke's contract (Pltfs.' Ex. B, R. 145-147, 140) correspond to the minimum local union scale (R. 325), each of these leaders, at the time the engagements booked by these contracts were played, was paying his sidemen above union scale. (R. 258, 136) While one of Blue Barron's contracts lists $10.00 as one evening's wages for a sideman (Pltfs.' Ex. B-34, R. 303-305, 290), this leader was paying his men a salary of $150.00 per week. (R. 326) Since the ballroom owners had nothing to do with fixing the pay of these sidemen (R. 75, 98, 325, 326), and did not know and had no way of determining the amount thereof (R. 65 and 73), it logically follows that if they, as the employer, are required to return the social security taxes thereon, the only amounts they can report as wages for that purpose are the sums listed by the leader or his booking agent on the contract, which means that the actual amounts paid by the leader in excess of such sums will entirely escape taxation. What happened in these three instances in the cases at bar will again happen countless times if the leader is relieved from his liability as an employer to return and directly pay to the government the tax on the actual wages which he pays the sidemen of his orchestra. This is so for one reason, among others, that it is utterly impossible for a leader to state in advance how much pay each musician will receive for a single night's work when the leader pays weekly salaries and usually doesn't know

exactly how many nights in any week that his orchestra will play. The foregoing facts alone furnish ample support for the trial court's finding that the Form B contract was an anticipatory device to enable the leader to escape taxation.

The second reason given by the majority opinion is that "if the legal relationship of employer and employee was created between the ballroom operators and the orchestra members, as it was here in the circumstances of the negotiation and execution of the contract, and that relationship had not thereafter been abrogated, the ballroom operators were simply bearing the burden of the taxes which the statute imposes upon anyone who occupies an employer's status." The opinion does not state what these "circumstances of the negotiation and execution of the contract" were, but at most they constituted merely evidence conflicting with the substantial evidence on which the trial court based its third finding that the parties at the time of the execution of the Form B contract did not thereby intend to transfer the right of control over the sidemen and their work from the leaders to the ballroom owners. The voluminous record facts making up this substantial evidence are reviewed on pages 89 and 90 of this brief and need not be repeated here.

Moreover, the reasoning of the court is erroneous because it assumes that the creation of an employer and employee relationship is to be determined solely from the circumstances of the negotiation and the execution of the contract without taking into account the all-important fact as to whether or not there was any actual change in the conduct of the parties after the contract from what it was before. The authorities cited earlier herein uniformly hold that where the sole motivation for a contract is tax avoidance without any change in the actualities of the relationship a court should disregard such contract and determine

their status from the substance, rather than the form of their relationship.

The third reason given by the majority opinion is that the Commissioner of Internal Revenue, if he so chose, "could have insisted that the leader should pay social security taxes on his orchestra members all the way down the line "including those arising out of the brief engagements for the petitioners," but "this would not help the ballroom operators here" because "the right to make the choice in such an alternative situation is the Commissioner's, and a taxpayer who has a legal liability for the tax cannot complain of the choice." (R. 694, 695) Petitioners submit that this third reason is as equally untenable as the other two given by the court. First, because it clearly begs the question inasmuch as it assumes the very fact at issue, namely, whether the taxpayer has a legal liability for the tax. Second, it incorporates a rule of law which would tax a person as an employer not on the basis of who the statute says is the employer but who the Commissioner of Internal Revenue, in his arbitrary, capricious or wise determination, says is the employer. Circuit Judge Gardner, in his dissenting opinion (R. 708) pointed out the inherent unsoundness of such a rule when he said:

> "What Congress has commanded to be taxed must be taxed. Here the statute taxes employment and nothing else. Both the Commissioner and the taxpayer are subject to the statute and cannot by adopting a fiction of the parties shift the burden of tax from those upon whom Congress has placed it."

That Judge Gardner, and not the majority opinion, correctly states the rule of law applicable to the present cases is clearly shown by the concise language of the Third Circuit Court of Appeals in *Tex-Penn Oil Co. v. Commissioner*, 83 F. 2d 518 (affirmed by this court in 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755), as follows:

> " . . . the rule is well settled that in determining tax liability, tax authorities must look through form to fact and substance."

Finally, the rule announced by the majority opinion would violate a fundamental principle of our judicial system and that is that every person on whom liability is sought to be imposed is entitled to his day in court. The countless cases in which the Commissioner's determination of tax liability has been reversed by the courts readily demonstrates that his judgment is not infallible. Under the Circuit Court's rule, a person, with no opportunity for a judicial determination, could have an employment tax imposed on him by a ruling of the Commissioner based on a consideration of only a few of the pertinent facts and made as the result of ex parte conferences with representatives of a powerful "pressure group" interested solely in shifting the burden of such a tax from their employer members while still permitting them to retain all of the benefits of an employer status on which Congress has imposed the tax. For thoroughly convincing proof of the likelihood of just such a situation occurring under such a rule, one need not go beyond the record of what actually happened in the cases at bar.

As pointed out earlier in this brief, during the time the union's counsel was drafting the Form B contract there were at least three conferences between such counsel and Petrillo and the Treasury Department's attorneys regarding the terms and provisions of that contract and the subject generally of "who was to be recognized as employer." (R. 575, 577, 578) Those were ex parte conferences at which no representatives of the nation's many thousand ballroom operators, or of the movie industry or the radio industry or of the theatre and entertainment world were present. (R. 619) The record further shows that on February 20, 1941, long before the union membership was advised

of its existence, James C. Petrillo, the Union President, submitted it, without reference to any other material fact, to the Commissioner of Internal Revenue with a request for a ruling. (Page 18 of Plaintiffs' Ex. B-37, R. 585, 582)

The Form B contract was not promulgated until the May 1941 issue of The International Musician and the order requiring all the amusement and entertainment world to use it in the booking of orchestra engagements did not go into effect until June 1, 1941. (Page 21 of Plaintiffs' Ex. B-37, R. 587, 582)

The Commissioner's ruling which set the stage for the avalanche of litigation of which the cases at bar are typical and fixed the Department's position on all orchestra engagements in connection with which the Form B contract was used was addressed to an orchestra leader and bore date of April 12, 1941. This ruling said:

> "Upon the basis of the terms of the contract it is clear that the hotel has the right to exercise over you and the musicians performing under your direction the control and direction prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. It is therefore held that you and the other members of the orchestra are employees of the Stevens Hotel for purposes of the taxes in question." (Page 18 of Plaintiffs' Ex. B-37, R. 585, 582)

At the very time when Mr. Petrillo's letter requesting a ruling on the basis of the *bare* contract was received there was in effect a ruling of the Treasury Department containing an express requirement that every request for a ruling regarding the status of orchestra members for social security tax purposes must be accompanied by eight different items of fact information *in addition to the form of contract*. The required *additional* information had to do with the manner of performance of engagements, the orchestra's origin, its personnel, and "who has the right

to select, control, fix the compensation of, and discharge the members of the orchestra." Mim. 4797, June 22, 1938. These matters, it is to be noted; are the very facts which the district court, in company with courts everywhere, held should be considered together in determining the relationship of parties for social security and employment tax purposes.

It thus affirmatively appears that the Commissioner's choice in the present cases was made after hearing only one side of the story from a very much interested party and without even considering the very facts which his own administrative rules ordinarily required be submitted as relevant information for his guidance in rendering rulings in orchestra cases. To deny a person the right to complain of such a choice, as the court below held, not only amounts to the rankest kind of "taxation without representation" in the first instance but in addition forecloses him from thereafter ever contesting the validity of the same in the courts. These shocking implications of the majority opinion rule apparently caused even counsel for the Commissioner to doubt the wisdom thereof for on page 7 of the Collector's brief in opposition to the petition for writs of certiorari, he states:

> "*Perhaps* when, as here, the tax incidence is merely transferred, the case is to be treated as no different from a private lawful transfer of tax burden after payment." (Italics supplied.)

Because of the foregoing reason as well as the first two stated, petitioners are confident that such a manifestly unfair and unjust rule will not be approved by this court.

II.

The record facts abundantly support the district court's finding of fact that the leaders, and not petitioners, had the right to control the manner and means of the performance of the sidemen in their orchestras.

A.

A district court's finding of fact supported by substantial evidence cannot be disturbed.

The district court in its Finding No. 1 found that the leaders, and not the petitioners, had the right of control over the members of their orchestras and the method and manner of doing the work. (R. 662, 663) That court also found in Finding No. 3 that the parties did not at the time of the execution of the Form B contracts thereby intend to transfer such right of control from the leaders to the ballroom operators. (R. 663) Obviously this finding supplements and sustains Finding No. 1. Consequently much of the record evidence hereinafter reviewed in support of the latter finding also supports Finding No. 3, and we shall, therefore, treat both findings as the equivalent of one finding with respect to who as between the leader and the petitioners had the right to control the means and manner of the performance of the sidemen of the orchestra.

Under the well settled rule of this court, the foregoing findings were presumptively correct and could not be disturbed by the Circuit Court of Appeals unless clearly erroneous. *McCaughn v. Real Estate Land Title & T. Co.*, 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879, and *Adamson v. Gilliland*, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356. Rule 52 (a), Rules of Civil Procedure. And as Circuit Judge Gardner pointed out in his dissenting opinion, "a finding

of fact is clearly erroneous only when it is not supported by substantial evidence, or is arrived at by the application of a wrong principle of law." (R. 700) Having devoted the first main brief point of our argument to the proposition that the findings of the district court were not arrived at by the application of a wrong principle of law, we now consider whether the findings of fact with respect to the right of control are supported by substantial evidence.

Substantial evidence requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National L. R. Bd.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126. In determining whether there is substantial evidence to support the findings of fact of the trial court, this court must consider the evidence most favorably to the party prevailing in that court, and when the evidence is open to "diverging inferences", the question as to which inference should be drawn is for the trial court and not the Court of Appeals. *United States v. Jefferson Elec. Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.

Petitioners now review the record facts which petitioners submit constitute not only substantial but also abundant evidence that the leaders, and not the ballroom owners, had the right to control the means and manner of performance of the sidemen of their orchestras.

B.

The following record facts abundantly support the district court's finding with respect to the right of control.

1. *The leaders, and not petitioners, actually exercised control of the means and manner of performance of the members of their orchestras.*

One of the findings of the District Court which, in the words of Circuit Judge Gardner (R. 708), the majority opinion "brushes aside" is the finding "that at all times, and during the times of the performance by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work." (R. 662)

The undisputed record supporting this finding shows that petitioners were concerned only with getting an orchestra in each instance whose reputation and distinctive style of music would attract patrons to their ballrooms and please them while they were there. (R. 313) Petitioners selected each of the orchestras because they believed it had such reputation and distinctive style of music and they relied upon the leader thereof to furnish an orchestra which in its performance would measure up to its reputation and produce the distinctive style of music which petitioners wanted for the enjoyment of their dance patrons. (R. 54, 74, 313) Petitioners were not concerned with the details and manner of the work, but only with the result. The special quality of the music produced by orchestras such as those in the present cases depends principally on the ability of the individual musicians, the instrumentation, the selections played and the manner of leadership. Every

single one of these factors was controlled by the leaders of each orchestra involved herein and not by the petitioners. (R. 55, 56, 73, 315, 319)

It was the leader, and not petitioners who determined what instruments should be played in the orchestra. (R. 56, 133, 165, 275, 352) It was the leader, and not petitioners who selected, paid for and compiled the music library of arrangements from which the dance pieces were played. (R. 58, 133, 165, 271, 272, 350) It was the leader who rehearsed the members in an attempt to produce the style of music he desired the orchestra to play. (R. 132, 165, 166, 276, 355, 356) Moreover, it was the leader who determined the particular selections and the order in which they should be played at any given performance. (R. 58, 133, 165, 272, 350) Griff Williams' testimony that Roy Bartels told him to mix up the selections was denied by Bartels (R. 58), and Paul Moorhead's testimony that Larry Geer told him to play a waltz every hour was denied by Mr. Geer. (R. 315). These were the only instances in which any leader claimed petitioners gave any instructions. Of even more importance, it was the leader, in the case of each orchestra, who directed its tempo, volume and style of music and told the members when to begin and when to stop. (R. 55, 56, 73, 275, 320, 321, 353-355) The record is undisputed that petitioners did not exert any control whatever with respect to any of these matters (R. 108, 315, 319) and the collector has conceded in his brief (p. 6) in opposition to the petition for writs of certiorari that such was the fact.

The Circuit Court's decision that the District Court erred in concluding from the above described practice of the parties that the leader had the right to control the details and manner of the performance of the orchestra members, notwithstanding whatever provision purporting to cover such right was contained in the Form B contract, is directly

controverted by the numerous holdings of courts which have determined the right of control over the details of the work to be in one of the parties, not from what they said about such right in their written contract, but from what they did under it. *Gulf Refining Co. v. Brown*, 93 F. 2d 870 (C. C. A. 4th); *Matcovich v. Anglim*, 134 F. 2d 834 (C. C. A. 9th) certiorari denied, 320 U. S. 744, 64 S. Ct. 46, 88 L. Ed. 441; *Sanford v. Goodridge*, 234 Iowa, 1036, 13 N. W. 2d 40; *Willard Sugar Co. v. Gentsch*, 59 F. Supp. 82 (N. D. Ohio); *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Neb.); *Wabash R. R. Co. v. Finnegan*, 67 F. Supp. 94 (E. D. Mo.); *Royal Theatre Corporation v. United States*, 66 F. Supp. 301 (Kan.).

In *Gulf Refining Co. v. Brown, supra*, the defendant company, by an express provision in a written contract, sought to vest the right to control the work of certain persons in its so-called "consignee." The evidence showed that defendant did in fact exercise control and the question of right of control was submitted to the jury which found for the plaintiff. In holding this was not error, the court reviewed the evidence and said:

> "Facts like those pointed out above as indicating a very complete control by the company of its products during the process of sale and delivery have been found determinative, and it has been decided that the oil company has not only held out the distributor as its employee, but has controlled and directed him in important particulars and in practical effect has retained power to subject him in the course of the business to its will and direction in any respect in which it might choose to do so. (citing cases) . . .
>
> "It is only by consideration of all of the facts pertaining to the relationship in any case, including the provisions of the contract, the actual conduct of the parties, and the conditions of the business in which they are engaged, that it can be determined whether the distributor is endowed with that control over his own methods and means of doing the work which is the

test of an independent contractor. No more definite test has been devised, and the Restatement of Agency itself, section 220 (2), merely lists certain matters of fact which, amongst others, may be considered in determining whether one acting for another is a servant or independent contractor. When these nonexclusive tests are applied to the facts of the pending case, we find confirmation of the conclusion we have reached."

In *Willard Sugar Co. v. Gentsch, supra,* where one of the questions was whether one Kolb was an employee of the plaintiff for social security and employment tax purposes under a contract specifically reciting that Kolb should not be subject to the control or supervision of the plaintiff, the court said:

"These recitals or written provisions in the contracts, however, are not convincing. It is entirely unimportant what designation or terminology was used in these written instruments to denote the relationship of the parties, when the evidence persuasively shows that the relationship was that of employer and employee and not of contractor and contractee."

In *Wabash R. R. Co. v. Finnegan, supra,* the question was whether certain persons were the employees of the plaintiff railroad under the Carrier Taxing Act. Plaintiff claimed such persons were the employees of a company which had contracted in writing to perform certain services for it. Three of the contracts expressly required the contractor to supervise and exert authority over the workmen in the performance of their services. In rejecting this claim and holding that the plaintiff was the employer notwithstanding the written contracts, the court said:

"All of the control, supervision and authority exercised over the workmen was by plaintiff. It directed the workmen, to no less an extent than had it employed them and carried them on its payroll. The nature of services to be performed was such that the plaintiff could not surrender control and supervision in fact,

> even if it did so in words. Plaintiff and the contractor, by their conduct, gave a necessary practical construction as to the instruments signed by them. This construction is entitled to great weight in determining the proper interpretation to be placed upon the contract. * * *"

The rule announced in the foregoing cases and applied by the district court in the cases at bar is summarized in 27 American Jurisprudence 488, as follows:

> "Whether the employer exercises control may be a fact to be considered in the determination of the relation of the parties * * * and the fact that during the performance of work, the employer has exercised no control may be considered as tending to show that he has no right to control."

The law is, therefore, clear that the District Court, notwithstanding the provision of the Form B contract purporting to vest the right of control in the ballroom owners, was entitled to consider the fact that the leaders, and not petitioners, exercised control of the manner and means of performance of the sidemen of their respective orchestras during the engagements as material evidence on which to base its finding that the leaders, and *not* petitioners, had the right of control over the means and manner of the performance of the sidemen in their orchestras during the engagements in question.

2. *The leaders, and not petitioners, had the exclusive right to hire and discharge the members of their orchestras.*

Another District Court finding which the majority opinion "brushes aside" is its finding that at all times and during the times of the performances by the several orchestras, the leader exercised and had the exclusive right to hire and fire the members thereof. (R. 662) The majority opinion

makes no mention whatever of this finding or the evidence supporting the same. That evidence shows that the personnel of each orchestra was selected and hired by the leader long before it ever appeared for the engagements for the ballroom operators. (R. 131, 132, 164, 270, 346, 347) The ballroom owners never had anything to do with selecting the sidemen of any orchestra, never had any conversation with either the leader or any sideman in that regard and knew nothing about the hiring arrangement between him and his leader. (R. 66, 73, 326, 327)

Each leader testified that he was the one who discharged the members of his orchestra, and that whenever a sideman quit his orchestra, such sideman came to him and notified him of his intentions in that respect. (R. 133, 164, 271, 349) Petitioners testified that they never discharged any sideman and never talked with any leader or sideman about discharging the latter (R. 66, 67, 326, 327), and that they did not believe they had such right to discharge. (R. 66, 67)

Illustrative of the evidence showing the leaders' understanding that they had the right to hire and discharge the sidemen of the orchestra is the statement of "Doc" Lawson in his letter of December 9, 1941, to Mr. Geer, as follows:

> "I *fired* my whole band and am starting out Dec. 20th *with all new men*, but two, and an entirely different style. As long as I am going commercial, I might as well go the whole way. *Have all my new men hired* and rehearsing six days to start out on." (Italics supplied) (Pltfs' Ex. B-29, R. 273, 272)

Having ignored the foregoing mass of evidence supporting the trial court's finding, the majority opinion does cite, as "generally illustrative" of the fact that the right of control in the ballroom owners was a "practical reality" after the Form B contract, an instance where "in one of the engagements in suit the orchestra appeared without its regular piano player and the ballroom operator exercised the

prerogative of selecting and requiring the leader to use a certain local musician for the performance." (R. 693) This is the *only instance* in the entire record in which interveners claimed any ballroom operator ever hired a sideman, and even in this instance the majority's version of what happened is directly contrary to the record testimony of Mr. Geer that he did not hire the musician in question but that the leader did (R. 321) and the record testimony of the leader wherein he refused to state that Mr. Geer hired her (R. 628) and admitted that he fixed the amount of her pay and paid her. (R. 629)

If the majority opinion by its "silent treatment" of the foregoing record meant to imply that the trial court's finding based thereon was wholly immaterial as having any bearing on the right of control, such implication is squarely refuted by the holdings of other courts in orchestra cases. For example, the record as to the right to hire and fire sidemen was the same in the case of *Williams v. United States*, 126 F. 2d 129 (C. C. A. 7th) as in the present cases, and the opinion of the court of appeals specified such right as one of the elements which must be considered to properly determine the question of who is the employer, saying:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work, (*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *Densby v. Bartlett*, 318 Ill. 616, 149 N. E. 591, 42 A. L. R. 1406) * * *."

Commenting further on the matter of the right to hire and discharge, the court said:

> "Without this right there could be no effective control by an employer. As was said in *Pioneer Construction Co. v. Hansen*, 176 Ill. 100, 108: " * * and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist, unless the power to discharge exists * * ". Other

cases to the same effect are *Casement v. Brown, supra, Shannon v. Nightingale,* 321 Ill. 168, 174."

After concluding that the evidence required a finding by the trial court that the establishment owners had no right to hire or discharge the members of the orchestra, the court stated the legal effect of such finding as follows:

> "To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer."

Another orchestra case dealing with the relation of the right to hire and fire to the right of control is *Los Angeles Athletic Club v. United States,* 54 F. Supp. 702 (S. D. Cal.), appeal dismissed 144 F. 2d 352 (C. C. A. 9th) wherein the court said:

> "Moreover, inasmuch as the right to control and direct the method and manner of doing the work necessarily involves the power to discharge, the existence or absence of this right on the part of the employer is a factor which strongly indicates the relationship involved in different situations."

In considering the record which proves that the leaders, and not the ballroom establishments, had and exercised the right to hire and fire the members of the orchestra it is important to note that numerous by-laws of the American Federation of Musicians contained in the official printed editions of 1941 and 1942 not only recognize that the right of hiring and firing of the sidemen is in the leader but expressly prohibit the granting of such rights to the establishment owners. The importance of these by-laws becomes immediately apparent upon examination of the provisions of the Form B contract stating that the by-laws of the A. F. of M. are made a part of the contract and providing in effect that such by-laws shall supersede and override any contrary provision of the Form B contract. (R. 13)

The Union by-laws affirming and recognizing that the right to hire and fire the sidemen is in the leader is Section 10-K of Article XIII as it appears in the 1940, 1941 and 1942 Official Edition of By-laws. It reads as follows:

> "All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two weeks' notice to the other." (Pltfs' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544, 538)

The record shows that the leaders adhered to the requirements of this by-law and followed the practice of giving two weeks' notice when they discharged a member of the orchestra. (R. 164, 271, 272, 349)

At least three of the by-laws which were in effect during 1941 and 1942 denied to any establishment owner the right to hire and fire the sidemen of an orchestra. The first of such by-laws is Section 29 of Article X (Interveners' Exs. 6 and 7, R. 596, 592 and 541, 542, 538), the pertinent provisions of which were quoted in the holding of the court in *Williams v. United States, supra,* as follows:

> "'Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished. * * *'"

Concerning this by-law the court said:

> "Thus the sidemen were prohibited from accepting engagements with the establishments or their agents. It would seem to follow that no relation of employer and employee did or could exist between the establishments and the sidemen. By the preclusion of such relation, the right of the establishments to hire and discharge was likewise precluded."

The same effect was given this by-law by the court in the cases of *Los Angeles Athletic Club v. United States, supra,* and *Spillson v. Smith,* CCH Unemployment Ins. Service, Vol. 1, Par. 9111 (N. D. Ind.), affirmed 147 F. 2d 727.

Another by-law to which we refer is Section 39 of Article X, which states:

> "A member of the Federation cannot accept an engagement to join a traveling band or orchestra from a non-member, neither can he negotiate with a non-member for such engagement.
>
> "A member shall be deemed guilty under the provisions of this law if he negotiates for such an engagement as named in the law with a non-member, even though he subsequently signs a contract for the same engagement with a member of the Federation." (Interveners' Exs. 6 and 7, R. 596, 592, and 542, 538)

Still another by-law containing a similar provision is found in that part of Section 18 of Article XII reading as follows:

> "Traveling members other than leaders must sign contracts with contractors, members of the A.F. of M." (Interveners' Exs. 6 and 7, R. 598, 592 and R. 543, 538)

The above by-law is made to specifically apply to traveling dance orchestras by the last paragraph of Section 10 of Article XIII. (Interveners' Exs. 6 and 7, R. 597, 592, and R. 545, 538)

It does not appear that any of petitioners were members of the American Federation of Musicians and the record shows that none of the owners of the Crystal Ballrooms were members. (R. 68) All the leaders and sidemen were at all times members in good standing of the American Federation of Musicians. (R. 653)

Common sense tells anyone that the leaders had to retain the power to hire and fire the musicians of the orchestras else the discipline, coordination of effort and standard-

ization of performance necessary to produce a marketable musical entertainment product would be lacking. The leaders did retain the power and the Union's by-laws realistically required that they do so. The same common sense also compels the conclusion that, regardless of all else, control over the work of an employee rests with the person who can say when and whether or not he is to work and draw pay and whether or not and when he shall cease to work and draw pay. It is therefore no wonder that the courts have consistently treated the right to hire and fire as "nearly decisive" and "strongly indicative" of an employment relationship.

3. *The leaders and not petitioners, determined the amount of wages of the sidemen of their orchestras and its manner of payment.*

Another District Court finding which the majority opinion "brushes aside" is its finding that the leader in the instance of each orchestra "exercised and had the exclusive right to contract for and pay their wages." (R. 662) The materiality of this finding is readily apparent from the holding of the Seventh Circuit Court of Appeals in *Williams v. United States, supra,* expressly enumerating as one of the elements having a material bearing on the right of control "the method and determination of the amount of payment of the workmen." The Eighth Circuit Court of Appeals likewise took into account this same element for the same purpose in *Bertino v. Marion Steam Shovel Co.,* 64 Fed. 2d 409.

The majority opinion makes no mention whatever of the foregoing finding or the evidence supporting same. That evidence is significant because it reveals that the Form B contract's provision that "on behalf of the employer the leader will distribute the amount received from the employer to the employees, including himself, as indicated

on the opposite side of this contract, or in place thereof on a separate memorandum supplied to the employer at or before the commencement of employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself" was nothing more nor less than an unrealistic fiction which in practice was wholly disregarded. Every witness who testified on the subject (including the leaders themselves) testified that the leaders fixed and determined the wages of the sidemen and the method of payment. (Al Menke R. 136-139, 158; Paul Moorhead, R. 168; "Doc" Lawson R. 272, 278, Pltfs' Ex. B-30, R. 279, 278; Griff Williams R. 360, 361, 367, 390, 391, 394, 630, 631; Bartels R. 65, 66, 98; Geer R. 324, 326)

Only one of the contracts involved in the *Bartels* case contains a listing of the names of the sidemen and their rate of pay in the form provided on the reverse side for such listing. That single instance of compliance was the Buddy Fisher contract. (Pltfs' Ex. T, R. 89, 82) An attempt was made to have Griff Williams explain the absence of such information on the reverse side of his contract as an inadvertence by stating that on the back of the great majority of the other Form B contracts covering engagements by his orchestra at various establishments following the one at the Crystal Ballroom on September 1, 1941, (R. 398) and particularly those at the Palmer House in Chicago, the Copley-Plaza Hotel in Boston and the Baker Hotel in Dallas, Texas, he always listed the names and wages of his sidemen. (R. 374, 376) This testimony was proved to be false and untrue. Photostatic copies of Williams' contracts for those engagements are in evidence. (Pltfs' Ex. B-40 to B-44, inclusive, R. 633-651, 632) and the reverse sides of all these contracts are *wholly blank.*

The record further discloses that Paul Moorhead was the only leader in the *Geer* case who listed the names and wages of the sidemen on the reverse side of his orchestra's

contracts, and even he did not comply with the Form B contract for the reason that he did not list the actual compensation paid his sidemen but only $5.00 and $6.00 per man, (Pltfs' Exs. B-6 to B-24, R. 177 to 251, 176) the union scale respectively for a three and four hour engagement. (R. 325) He testified that during the year 1942 he always paid his men higher than union scale. (R. 258)

Nor was the alternative mechanics of furnishing a separate memorandum listing of musicians and their pay complied with. The only leader who purported to furnish a separate memorandum listing the names and wages of the sidemen was Tiny Hill (R. 97, Pltfs' Ex. A-1, R. 99, 100, 98), and even in that lone instance the memorandum was not in accordance with the terms of the contract since it was not delivered at or before the commencement of the engagement but was given petitioners after November 15, 1941, (R. 98), more than six weeks following the date of the engagement. The requirement of the Form B contract that receipts of the sidemen for their compensation taken from the sidemen by the leader and turned over to the establishment owner was never complied with. (R. 65, 73, 325)

Because the record so shows, petitioners submit that, the Form B contract provisions to the contrary notwithstanding, the leaders fixed and determined the wages of the sidemen and the method of payment. The finding of the trial court on this question was a correct and unavoidable one, not only because of the evidence to that effect was undisputed but also because the evidence also shows that, consistently, the *mechanics* so ingeniously devised in the Form B contract were likewise treated by the parties as mere sham and subterfuge.

4. The leaders were each engaged in an independent business for profit.

Another District Court finding which the majority opinion "brushes aside" is its finding that the leaders managed and controlled the orchestras as independent contractors for hire, and that they kept all the profits and sustained all losses incurred in the playing of the engagements. (R. 662, 663) The District Court in its opinion (R. 658) said:

> "The leader created and established and *had for sale* an independent business and the ballroom operator was interested only in the result of the performance." (Italics supplied)

The trial court's finding that the leaders were entrepreneurs engaged in the business of selling and delivering an orchestra and its musical entertainment *product* amounts to a holding that the musicians of the orchestra could not be employees of the ballroom establishments who merely *bought* the *product*. This unchallenged lower court finding is therefore a transcendent consideration which, in and of itself, required the court to hold that the leaders and the members of their orchestras were not employees of the ballroom establishments. *Barnes v. Thomas A. Myers & Co.*, 163 Md. 206, 161 A. 279; *Petzold v. McGregor*, 92 Ind. App. 528, 176 N. E. 640; 27 Amer. Jur., p. 483.

In addition to its persuasive *independent* force, the fact that the leaders were, as the district court said, in the business of selling a musical entertainment product for profit is also of prime importance in determining whether the ballroom owners or the leaders had the right of control over the means and manner of performance of the sidemen's services. This was made crystal clear by the Seventh Circuit Court of Appeals in *Williams v. United States, supra*, when it listed as a third element bearing on the right of control the fact of "whether or not the person doing the

work is engaged in an independent business or enterprise, and, particularly, whether he stands to make a profit on the work of those working under him."

The majority opinion makes no mention of the district court's finding that each leader was engaged in an independent business for profit but instead holds in substance that such leader was nothing more than a foreman of a group of musicians to conduct them in the performance of their services. This has been the position of the interveners and the American Federation of Musicians throughout the various stages of this litigation.

The correctness of the trial court's finding and the error of the Circuit Court's holding will be readily apparent from a review of the record in these cases. Three factors provide the test of whether or not one contracting to render services is an entrepreneur engaged in a business of his own. They are (1) Whether the contractor's work requires the exercise of independent judgment and professional skill (*Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384); (2) Whether he works for one person or holds himself out as available to others (*Lichtenager v. Silverman*, 254 N.Y.S. 392); and most important of all, (3) Whether he stands to make a profit from the work of the men under him (*Williams v. United States, supra*). Every single one of the factors is present in the case of the leader of a dance orchestra like those in the cases at bar.

It is common knowledge that the leader of an orchestra requires a high degree of skill. The selection of musicians and instruments, the selection of arrangements and the compilation of a musical library, the directing of the musicians in such a way as to produce a certain distinctive style of music, and the choice of dance numbers all called for the exercise of judgment. This is consistent only with the conclusion that each leader was an independent contractor.

As pointed out by this court in *Metcalf & Eddy v. Mitchell, supra:*

> "* * * the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring out the desired result. This permitted to them liberty of action which excludes the idea of that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor."

It is equally clear that the leader of each of the orchestras held himself out as ready to perform engagements for various types of establishments. Each orchestra had been in existence for many years prior to its engagements for the petitioners and had played for hotels, cafes, ballrooms, amusement parks, state fairs, policemen's balls, American Legion Posts, university and college organizations and various civic organizations in a territory covering several states and in some instances the entire nation. (R. 71, 127, 163, 259, 265, 330, 331, 442) One leader even testified that his orchestra had been in existence since 1914 (R. 126) and was known and advertised as "The Band of a Million Friends." (R. 134) The orchestras also made records, performed at theatres and in some instances broadcasted over the radio on nation-wide hook-ups. (R. 71, 332) Griff Williams' press manual (Pltfs' Ex. C, R. 406, 398) gives the following glowing account of his orchestra's engagements:

> "This band, which recently smashed all records at the world's largest hotel, the Stevens in Chicago, has been a favorite of 'straight' music fans at choice hotels, night clubs, theatres throughout the country, * * *.
>
> "They record for Varsity Records and are heard on the air over NBC, CBS, and MBS networks and on the Fitch Bandwagon program."

Small wonder the Circuit Court of Appeals in the *Williams* case, *supra*, aptly described the orchestra as follows:

> "In other words, it was a going concern; ready and willing to serve any and all who might contract its services."

Finally, the record shows conclusively that each leader was conducting a financial enterprise from which he hoped to, and did, make a profit and from which he stood a chance of taking a loss. The leaders, without exception, testified that if anything remained from the proceeds of an engagement after the payment of the booking agent, the sidemen, transportation and other expenses, the leader received it. (R. 137, 138, 168, 277, 361, 362) They also testified that in the event the proceeds from an engagement were insufficient to pay the sidemen and the other expenses of the orchestra, the leader personally stood the loss. (R. 138, 277, 362)

The leaders kept detailed records of their business operations for the purpose of determining whether they made a profit or a loss, the same as any other business men engaged in independent business. Illustrative are the weekly business reports made by Paul Moorhead concerning his operations during 1941 and 1942. (R. 167-169) The report covering the week in which his orchestra's engagement of January 18, 1942, at the Crystal Ballroom was played (Pltfs' Ex. B-1, R. 167-169, 170) is typical of these reports. On one side of this report is listed the engagements for that particular week and the amounts received therefrom which are totalled and entered as "Total gross receipts $676.44." Beneath this entry is the recital, "Less—operating expenses this week—$574.91." Shown below this is the further recital "Balance—Profit—Loss $101.53." On the reverse side of the report which is entitled "Itemized Operating Expenses" appears a breakdown of expenses of

the orchestra for the week in question which include union tax in the sum of $26.80, salaries of the sidemen totalling $385.81, and various miscellaneous items as follows: gasoline, $30.80, oil $4.90, other transportation expense $20.92, Vic Shroeder Agency, booking fees $101.53, goodwill expense $5.75, special arrangements Bob Roper (music) $10.00, P.A. set repairs $4.45, telephone and telegraph $3.70, bus deodorant $0.25. On the same side appear other captions such as "interest paid", "insurance for business only", and "advertising", for which it appears that no expense was incurred during the week in question.

Similarly, Al Menke included the gross receipts from the engagements of his orchestra in his federal income tax return and took a deduction thereon as an expense item the weekly salaries paid his sidemen. (R. 138) As an employer he paid not only social security taxes to the federal government on these salaries, but also employment taxes to the state of Minnesota. (R. 137, 138) *His employment record was so favorable that, under the Minnesota law's merit rating system, he had the lowest contribution rate possible.* (R. 137)

A statement of Tiny Hill (Pltfs' Ex. A-1, R. 99, 100, 98) shows that after the payment of the expenses of his orchestra's engagement at the Crystal Ballroom (including compensation of sidemen), there remained an unexpended balance of $123.68 which he stated would be used for additional transportation, advertising, exploitation, additional booking expense, personal manager's salaries (cabs, lunches, etc.), of all kinds and any other legitimate expenses that may arise from time to time in the operation of what he frankly calls an "enterprise."

The record contains much additional similar evidence but a further review would only unduly prolong this brief. It is sufficient to say that one can hardly imagine a more typical independent business enterprise in every sense of

the word than the business of each leader in the cases at bar. Each orchestra had an established trade name which the leader owned and under which it was advertised and booked. Its personnel did not often change. The leader owned a distinctive theme song, which he used to identify his orchestra on the radio and in the playing of dance engagements. His orchestra had become identified with a distinctive style of music which it was known to produce and on which the leader relied to maintain the reputation and public acceptance of himself and his orchestra. The leader offered his musical product for sale at any time or place to those who would pay the price demanded by him.

The leader thus made sales of a product to cover his expenses of producing it (including the wages of his sidemen) and to afford him a profit. And if there was a loss from the operations of the enterprise he stood it. He was as much a business man as any other person engaged in an independent business for profit and in so holding, with respect to the status of Griff Williams on identical facts, the Seventh Circuit Court of Appeals in *Williams v. United States, supra,* said:

> "Another significant fact is that plaintiff was engaged in an independent business for profit. The court found that " ' ' the plaintiff paid the traveling expenses of the orchestra, commissions and other miscellaneous expenses, as well as the compensation of the sidemen, and the residue, if any, which in no event was less than the minimum scale for leaders, belonged to the plaintiff.' Thus, the plaintiff was in a position to receive a profit from the services of the orchestra. The compensation received by the sidemen was fixed by agreement with the plaintiff, but the amount received by him was to be determined by what was left after the payment of fixed charges. It is also pertinent to observe that the orchestra was not organized and trained at the behest of the establishments, but long prior to the year in question. In other words, it was

a going concern, ready and willing to serve any and all who might contract for its services."

Significant evidence of the universal recognition that orchestra leaders are entrepreneurs is supplied by the by-laws of the American Federation of Musicians. Standing Resolution 58[1] of the Union, expressly incorporated by reference as a part of the Form B contract after June 1942, reads as follows:

"To promote *his business*, a leader may borrow money in any manner not contraventive of Standing Resolution No. 58 or any other law, rule or resolution of the Federation, but he must not make any arrangement and/or agreement directly or indirectly subjecting him to interest and/or bonus of more than 10% per annum nor more than a total of 25% of the total sum borrowed and which is to be repaid. * * * *

"Leaders of bands or orchestras are prohibited from directly or indirectly, through any device or method whatever, acquiring any financial interest of whole or part *ownership* in any other band or orchestra, provided that a leader may wholly, but not in part, *own any other band which accepts or fills engagements under his own name.*" (Italics supplied) (Interveners' Ex. 6, R. 601, 602, 592)

Why such references to the leader "promoting his business", "borrowing money" and "owning bands" in the very union rules made a part of the Form B contract if, as interveners claim, the leader was merely a fellow employee?

That the leaders themselves, notwithstanding the pro-

[1] This resolution was first adopted at the June 1942 convention of the musicians' union (Pitts' Ex. 6, R. 592, 603), which was many months after the promulgation of the Form B contract and its incorporation in the union's 1941 by-laws. Note that the language of the resolution characterizing the leader as an employer directly contradicts the Circuit Court's holding (R. 696) in effect that such promulgation and incorporation of the Form B contract was intended by Petrillo and the union to repeal all By-Laws referring to the leader as the employer of the members of his orchestra.

vision [illegible] Form B contract, fully understood that each was engaged in an independent business of his own from which he stood to make a profit or sustain a loss, and that the sidemen in playing engagements were making what he had to sell—namely a distinctive style of music and entertainment—is well illustrated by statements made by "Doc" Law[illegible] in his letter of December 9, 1941 (Pltfs' Ex. B-29, R. 273, 272), as follows:

> "Am playing my last week with my present band and starting out December 20th with the old Dixieland band, a duplication of what I had *when I was making the money. The people here want two beat tempo and I have been forcing four beat on them or trying to, rather and not doing so well at it,* so am going back to a duplication of the band I had three years ago, suit cases of novelties, breaking fiddles, burning straw hats, etc. * * * I fired my whole band and am starting out Dec. 20th with all new men, but two, and an *entirely different style.* As long as I *am going commercial,* I might as well go the whole way." (Italics supplied)

In view of the foregoing uncontroverted record showing beyond question that an employment relationship existed between the leader and his sidemen, it is not surprising that the government has now conceded that such leader, and not the ballroom owners, was the person *"for whom the musicians worked steadily."* (Italics supplied) (See p. 7 of Collector's brief in opposition to petition for writs of certiorari).

Any attempt on the part of petitioners to exercise control over the means and manner of performance of the sidemen would destroy the orchestra and its value as entertainment.

As bearing on the question of right of control, the entrepreneurial nature of the leaders' business is significant because, in contending that control over the orchestras was

not, in fact, vested in the leaders, respondents are necessarily asserting that leaders who were undeniably in business for profit and constantly battling the ever-present concomitant danger of failure, nevertheless relinquished the *sine qua non* for their success (i.e. control over their musical entertainment product) to each ballroom establishment, as each one-night stand after another was played. The trial court in its opinion pointed out that if the "owner attempted to exercise any such right of taking charge and control of the orchestra it would destroy the orchestra and the result of a satisfactory entertainment. It just could not be done." (R. 662) Petitioners submit that the plain import of the trial court's statement, viewed in the light of its entire opinion and findings of fact, is that it is entirely unreasonable to believe that a leader intended to transfer to the ballroom owners the right of control over the performance of his sidemen when he knew that any attempted exercise of such right by such owners would destroy the orchestra and the value of its entertainment product.

The majority opinion does not question these consequences of the exercise of control by a ballroom owner, and the mere recital of a few obvious facts will readily demonstrate that they are not open to question. Permitting one after another ballroom owner to conduct the orchestra according to their varying and different whims would be bound to have a disastrous effect upon the leader's business. To permit each ballroom establishment to exercise the controls would necessarily ruin a profitable orchestra business in which the leader is engaged because it would render it impossible for the leader to furnish the quality and distinctive style of music essential for the successful conduct of that business. Each and every public appearance in which a substandard performance was given would do inestimable damage to the priceless reputa-

tion of the leader and his orchestra and to their public acceptance, which the leader had built up through many years of effort and the expenditure of large sums of money. All this being true, the trial court's inference as to disastrous consequences of an establishment's attempted control over the services of an orchestra was an entirely reasonable one which the court was entitled to consider as one of the reasons supporting its ultimate finding of fact that the parties did not intend to transfer from the leaders to the ballroom owner the right of control over the manner and means of the performance of the sidemen in their orchestras. The district court having performed its function as a trier of fact in selecting an inference which was entirely reasonable, it was not within the province of the Circuit Court to reweigh the evidence and substitute inferences respecting the same subject matter which it felt were more reasonable. *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

5. *The leaders of each orchestra, and not petitioners, furnished the tools (except the piano) with which the work was done.*

Still another element bearing on the right of control is "which party furnishes the tools or materials with which the work is done." *Williams v. United States, supra.* The undisputed record shows that the leader owned and furnished the music racks (R. 135, 166, 275, 319), musical arrangements (R. 58, 133, 166, 271, 356), and the loud speaking system used by the orchestra in the performance of its services (R. 135, 166, 275, 276, 356); that he selected the attire of the sidemen (R. 135, 166, 275, 314, 357); and that he or the sidemen furnished the instruments used by them in producing the orchestra's music. (R. 55, 314, 315) Only the piano was furnished by the ballrooms. (R. 55) In

the case of those orchestras which traveled by bus the leader owned such bus and paid for the insurance, gas, oil and tires and other expenses of its operations, including, in some instances, the salary of a driver. (R. 135, 166, 168, 169, 276, 313) The Circuit Court's view that these facts were immaterial in a case where a contract purports to vest the right of control in one of the parties (R. 698) is directly contrary to Section 220 of the American Restatement of the Law of Agency, which specifically lists the fact of whether the employer or the workman supplies the instrumentalities and tools as one of the matters, in addition to the agreement respecting control over the details of the work, which a court may consider in determining whether one acting for another is an employee or an independent contractor.

6. *The parties operated in the same manner after the adoption of the Form B contract as before.*

The district court found that "there was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestra, subsequent to June, 1941, or by reason of the Form B contract, than there was before that time." (R. 663) The majority opinion of the court below not only "brushes aside" this finding but substitutes its own contrary one in that part of its opinion where, having admitted that prior to such contract an orchestra leader was the employer of his sidemen (R. 687, 688) and hence possessed the right of control over them, proceeds to find that after the adoption of that contract such right was in the ballroom operators not merely as a legal but as "a practical reality as well." (R. 693) This statement is the equivalent of a finding that the parties had changed their conduct with respect to control of the sidemen and their services after the use of the Form B contract. Such a finding is directly con-

trary to the record evidence that the leaders, in the playing of engagements booked under such contract, at all times directed the performances of their sidemen, dictating such matters as the style of music, its length, tempo and volume (R. 55, 56, 73, 275, 315, 320, 321, 353-355), and the further record evidence that petitioners never gave any directions or instructions, either oral or written, to the leader and sidemen of any orchestra during the playing of its engagement (R. 108, 315, 319), and did not believe they had the right to give such directions. (R. 102, 103, 318) The finding is also contrary to one leader's testimony that both before and after the effective date of the Form B contract he did not permit an establishment owner to direct and instruct the sidemen of his orchestra. (R. 139) It is likewise contrary to the testimony of the leaders (R. 139, 253, 277, 327, 364, 365) and the ballroom owners (R. 67, 102, 327) that the manner in which the orchestras operated and the conduct and practice of the parties were the same after the Form B contract as they were before. It is not surprising in view of this evidence that the Collector in his brief (p. 6), in resistance to the petition for writs of certiorari made no attempt to defend the above mentioned finding of the Circuit Court of Appeals but made the sweeping concession as follows:

> "The subsequently established record in this case indicated that *the new contract did not in fact result in any change in the conduct of the business, or the exercise of actual control over the musicians exclusively by the leader*, and the trial court so found." (Italics supplied)

That the district court was entitled to find from the foregoing record evidence that the parties did not by the execution of the Form B contract intend to transfer the right of control over the means and manner of performance of the sidemen to the leader is clearly established

by the holdings of courts in the following cases: *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Neb.); *Spillson v. Smith*, (N. D. Ind.) C.C.H. Unemployment Insurance Service, Vol. I, Par. 9111, affirmed 147 F. 2d 727 (C.C.A. 7th); *McDermott v. Henrickson*, 45 F. Supp. 277 (S. D. Wash.); *Royal Theatre Corporation v. United States*, 66 F. Supp. 301 (Kan.); and *Electrolux Corp. v. Board of Review*, 129 N.J.L. 154, 28 A. 2d 207.

7. *Petitioners justifiably believed that the Form B contract did not change their status with respect to the orchestras.*

According to Section 220 of the American Restatement of the Law of Agency, another factor which is to be considered by a court in determining whether one acting for another is a servant or an independent contractor is "whether or not the parties believe they are creating the relationship of master and servant." In this connection Roy Bartels testified that at the time the contract for the engagement of Griff Williams and His Orchestra for October 13, 1941, first came into his hands from Music Corporation of America, Griff Williams' booking agent, which was prior to July 26, 1941 (R. 53), he noticed that it was a new form and called James Breyley, an official of that corporation, on long distance telephone and objected to signing the contract because of its references to the Crystal Ballroom as the employer. (R. 117) Bartels was then told by Mr. Breyley that the Form B contract was just a change that had been requested by Petrillo, and that it would not change his status a bit. (R. 116) Bartels further testified that at the time he read the provision of the Form B contract making all the rules, laws and regulations of the American Federation of Musicians a part of the contract (R. 119) and that he knew that certain of these by-laws referred to the leader as the employer of his side-

men (R. 120) and "that the acts and performances of these men would not be changed by this contract." (R. 118) Because of this knowledge and the assurance of Mr. Breyley, Bartels did not believe that the Form B contract changed his status with respect to the orchestras from what it had previously been (R. 121); nor did he ever understand that the terms of the contract were such that he assumed the obligations of an employer to the sidemen and the leader of the orchestra (R. 121); that in signing all of the contracts he denied he was the employer (R. 122); and he never believed before or after the Form B contract that he had the right to give directions or instructions to the leader and the sidemen of an orchestra in its performance of an engagement. (R. 102, 103)

The foregoing testimony is further substantial evidence directly supporting the district court's third finding (R. 663) that the parties at the time of the execution of the Form B contract did not thereby intend to transfer control or right of control over the sidemen and their method and manner of doing the work from the leader to the ballroom owners.

8. *No change was made in the Union by-laws made a part of the Form B contract, which by-laws clearly show that the parties intended that the orchestra leader, as an independent contractor, would be the employer of the sidemen.*

The Form B contract expressly recites that "all the rules, laws and regulations of the American Federation of Musicians * * * are made a part of this contract" and expressly provides that in case of conflict between any of the provisions of the contract and the obligations of members of the union as specified in the by-laws, the by-laws are controlling. (R. 12, 13) A comparison of the Union Secretary's official compilation of that organization's by-laws for

the year 1940 (Pltfs.' Ex. B-39, R. 607-614) with his official compilation of its by-laws for the years 1941 and 1942 (Interveners' Exs. 6 and 7, R. 592-599 and 538-545) discloses that no changes whatever were made in numerous by-laws obviously enacted to protect the sidemen of orchestras against various practices of their brother members who, as orchestra leaders, were their employers, with the result that the Form B contract contains provisions which directly contradict and nullify the effect of artful language elsewhere set forth in the contract seeking to make it appear that the establishment owner, and not the leader, was the employer of the sidemen.

These by-laws are as follows:

(1) *By-laws recognizing the leader's right to hire the sidemen of his orchestra.*

Sections 24 and 27 of Article IX (Pltfs.' Ex. B-39, R. 611, 607; Interveners' Exs. 6 and 7, R. 594, 592 and 540, 538)

Sections 24, 29, 39 and 45 of Article X. (Pltfs.' Ex. B-39, R. 611-612, 607; Interveners' Exs. 6 and 7, R. 595-597, 592 and 540-542, 538)

Section 18 of Article XII. (Pltfs.' Ex. B-39, R. 613, 607; Interveners' Exs. 6 and 7, R. 598, 592 and R. 543, 538)

Sub-sections I and L of Section 10 of Article XIII. (Pltfs.' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544-545, 538)

(2) *By-law recognizing leader's right to discharge sidemen of his orchestra.*

Section 10-K of Article III. (Pltfs.' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544, 538)

(3) *By-laws recognizing leader's right to pay his sidemen and determine the amount of their compensation.*

Sections 23 and 48 of Article X. (Pltfs.' Ex. B-39, R. 610, 612, 607; Interveners' Exs. 6 and 7, R. 595, 597, 592 and 541, 543, 538)

(4) *By-laws recognizing leader as an independent contractor engaged in business for himself.*

Section 48 of Article X. (Pltfs.' Ex. B-39, R. 612, 613, 607; Interveners' Exs. 6 and 7, R. 597, 592 and 543, 538)

Section 10-C of Article XIII. (Pltfs.' Ex. B-39, R. 613, 607; Interveners' Exs. 6 and 7, R. 598, 592 and 544, 538)

The federal courts have held, in cases involving earlier forms of union contract which also incorporated by express reference the by-laws of the American Federation of Musicians, that Section 29 of Article X prohibits the existence of the relationship of employer and employee between an establishment owner and the sidemen of an orchestra notwithstanding other recitals in the contract purporting to create that relationship. *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th), *Los Angeles Athletic Club v. United States*, 54 F. Supp. 702 (S. D. Cal.) and *Spillson v. Smith*, (N. D. Ind.) C. C. H. Unemployment Service, Vol. 1, Par. 9111.

The district court, having concluded that each leader, and not the ballroom owners, was the employer of the members of his orchestra for the reasons stated in its opinion, did not find it necessary to pass on the question of whether the above mentioned by-laws were a part of the Form B contracts used to book the engagements involved in these actions. The Court of Appeals, however, because of its holding that the provisions of the Form B contract were conclusive of the relationship of the parties, necessarily was required to dispose of the question because of the contract's recital making such by-laws a part of the contract. It did so by holding that the statements of James C. Petrillo, President of the Musicians' Union, in his letter of May 1, 1941 (see page 24 of Pltfs.' Ex. B-37, R. 587, 582) to all locals that "this contract and none other must be used on all such engagements on and after June 1, 1941"

and "any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for such said violation" sufficiently required under the absolute powers vested in him by Section 1 of Article I of the by-laws, that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with the relationship attempted to be created by the provision for control in the Form B contract. (R. 696)

(a)

The letter of May 1, 1941, of James C. Petrillo, President of the American Federation of Musicians, did not constitute an implied repeal of the then existing by-laws in question.

The full text of Petrillo's letter of May 1, 1941 (see p. 24 of Pltfs' Ex. B-37, R. 587, 582) reads as follows:

"To all Locals of the
American Federation of Musicians:

Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with grand opera companies and symphony orchestras.

This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the Social Security Laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

This contract and none other must be used on all such engagements on and after JUNE 1, 1941. Any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for said viola-

tion. All engagements booked by licensed agencies must be contracted on these forms.

A supply of these contracts may be secured from the International Secretary's office.

Kindly be governed accordingly.

Fraternally yours,

JAMES C. PETRILLO,

President, A.F. of M."

Petitioners submit that the nullification effect given this letter by the majority opinion of the court below is clearly in error for two reasons. The first is that the only way Petrillo could change existing by-laws under the extraordinary power given him by Section 1 of Article I was by the issuance of an executive order which "by its terms" annulled or set aside the same. Petrillo's said letter of May 1, 1941, since it mentioned neither the by-laws nor anything about nullifying or setting them aside, was obviously not an exercise of this power. To nevertheless hold, as the court below did, that such letter had the effect of nullifying the by-laws by implication, is to grant Petrillo a power not contemplated by said Section 1 of Article I. In this connection it must be borne in mind that the meaning and effect of the absolute power which said section granted Petrillo to *nullify* any by-law was such as to require the entire musical entertainment world and the performers therein to be bound by a contract which amounts to an agreement that the rights, duties and liabilities of parties thereto shall be whatever Petrillo may by his arbitrary, capricious or wise decision, decide and determine them to be. It was because of the shocking extent of this extraordinary power that the union in its grant thereof expressly provided the safeguard that the same should be exercised in one and only one way, namely, by an order which "by its terms" *annuls* or sets aside a by-law. Not having been so exercised in the cases at bar, the power remained unexercised and the by-laws remained unchanged.

The second reason the majority opinion's said holding is in error is that at the time said letter was promulgated by Petrillo, neither he nor the American Federation of Musicians intended it to have the effect of nullifying any by-laws. The letter itself shows this to be true, not only because of the utter absence of any mention of the by-laws or any change therein, but also because its statement that "this contract and none other must be used on all such engagements on and after June 1, 1941", viewed in the light of the fact that the contract expressly incorporates by reference all by-laws as a part thereof, is as equally applicable to the contract's by-law provisions as it is to the contract's right of control provision. Being thus equivocal in nature, it furnishes no basis whatever for an inference that he intended the latter provision to supersede those containing the union by-laws. Moreover, the most the union's own witness ever claimed that Petrillo intended to accomplish was a revision and not a nullification of the by-laws. (R. 573)

Other circumstances which clearly show that neither Petrillo nor the union intended the former's letter of May 1, 1941 to have the effect ascribed to it by the majority opinion are the fact that the official copies of the federation's by-laws edited and published by its Secretary later in the year 1941 (Pltfs.' Ex. 7, R. 540-545, 538) and again in 1942 (Pltfs.' Ex. 6, R. 594-599, 592) contain the same verbatim by-laws as were claimed to have been nullified by such letter, and the fact that when the Secretary in July, 1944 did finally certify to a revision of Section 29 of Article X (one of the by-laws claimed to have been nullified by Petrillo) he officially stated that such revision was *not intended to take effect until September 1, 1944!* (R. 605, 606; pp. 12 and 14 of Pltfs.' Ex. B-38, R. 615, 617, 614) Surely the nullification by Petrillo by the exercise of his emergency powers of a score or more of by-laws which had

been on the books for more than fifteen years would have been an event of such noteworthy importance that the Secretary, whose duty it was to publish in the union's official journal not later than July following adoption all by-law changes (Interveners' Ex. 7, R. 539, 538), would have caused the same to be reflected in his official publication of the by-laws for the years 1941 and 1942. That he did not do so shows that the letter was not intended to have the effect which the majority opinion holds that it had. Moreover, it shows, as do all the other record facts above mentioned, that the claimed by-law annulment is such an incredible and fantastic story as to not be entitled to any weight whatever, and the Circuit Court therefore erred in basing its finding thereon.

Although the majority opinion of the court below held that the by-laws should not be treated or considered as a part of the contract by reason of Petrillo's proper exercise of "absolute" powers vested in him, it is noteworthy that the Circuit Court opinion claims that the effect of Petrillo's order was not *nullification* as provided for in Section 1 of Article I of the by-laws, but to "require . . . that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with . . . the 'Form B' contract." It is difficult to see how this statement of the Circuit Court's opinion can be squared with the provision of the Form B contract itself reciting that "the musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians." Every one of the by-laws in question created an obligation of the orchestra members to the federation. For example, Section 29 of Article X bound them to accept employment from the leader and not the ballroom owners. The court be-

low, in holding that the contract's provision regarding right of control made the sidemen the employees of the ballroom owners, was obviously guilty of a construction of the contract which directly interfered with the foregoing obligation. The same thing is true with respect to all the other by-laws in question. Petitioners submit that the above mentioned clause required the court below to consider the by-laws as paramount to any conflicting provision in the contract. That is exactly the effect which district court in *Spillson v. Smith*, supra, gave to the very same clause in the form of union orchestra contract which immediately preceded the Form B contract.

(b)

Assuming Petrillo's letter of May 1, 1941, did constitute an implied repeal of the then existing by-laws in question, such repeal did not nullify by-laws of like content which were re-enacted at the annual convention of the American Federation of Musicians in June 1941 and again at its annual convention in June 1942, and were therefore in full force and effect at the time each of the Form B contracts involved in these actions was executed.

The by-laws of the American Federation of Musicians making an orchestra leader the employer of the sidemen and prohibiting the existence of an employment relationship between them and an establishment owner were all re-enacted at that organization's forty-sixth annual convention held at Seattle, Washington, June 9-14, 1941 (R. 535, 536, Plfs.' Ex. 7, R. 538, 540-544), which was nearly a month and a half after May 1, 1941, the date on which Petrillo's letter prescribing the use of the Form B contract was sent to all union locals. The earliest Form B contract used to book an engagement in the case at bar is

dated June 25, 1941 (Pltfs.' Ex. W, R. 95, 82), which means that all of the Form B contracts involved herein were executed after the dates of the union's Seattle convention and hence all the by-laws adopted at that meeting necessarily became a part of those contracts. The same by-laws were again re-enacted by the union the following year at its annual convention held at Dallas, Texas, June 8-13 (Pltfs.' Ex. 6, R. 592, 594-599). Several of the Form B contracts in the cases at bar were executed in the year 1942 after these dates. (Pltfs.' Ex. A, R. 141, 140, and Plfts.' Exs. B-17 to B-23 incl., R. 221-245, 176)

It clearly appears from the foregoing record that even if it be assumed that Petrillo's letter of May 1, 1941 constituted an implied repeal of the by-laws in question existing on that date, such letter did not nullify by-laws of like content in force on the dates the Form B contracts involved herein were executed for the reason that all of such by-laws were re-enacted by the union at a time subsequent to the date of such letter and hence could not possibly have been affected by the alleged action of Petrillo taken prior to such time.

9. *The Form B contracts were not writings evidencing a meeting of minds of the parties arrived at through fair negotiations.*

Since the court did not conclude as a matter of law that the Form B contract was void for duress, it is apparent that the first part of his Finding No. 2 which reads as follows:

> "The contract, Form B, was not entered into by fair negotiation between the parties, but upon demand of the musicians' union and the leaders of the orchestras that it must be entered into or no orchestra could be obtained, * * *." (R. 663)

was merely in the nature of an auxiliary finding not essential to but further explaining and supporting his Finding No. 3 (R. 663) that the parties did not intend by their execution of the Form B contract to transfer from the leader to the establishment owner the right to control the means and manner of performance of the sidemen.

The above quoted finding is clearly supported by the undisputed evidence that neither the ballroom owner nor the leader negotiated the contract as free bargaining agents in the sense that they discussed the terms of their agreement and then incorporated those terms in a written contract prepared by either one or both of the parties. They used the Form B contract because James C. Petrillo, arbitrarily and dictatorially, ordered them to do so. For the leaders' failure to pay lip service to the contract meant being in violation of the Federation's laws (See letter of James C. Petrillo on p. 24 of Pltfs' Ex. B-37, R. 587, 582) and possible expulsion, and to the establishments it meant not getting orchestras. (R. 478, 488) Certainly these circumstances, while admittedly not sufficient to legally vitiate the contract on the grounds of duress, do indicate that the motivating force in signing the Form B contract was not a desire of the parties to actually transfer the right of control from the leader to the establishment owner but instead a desire to appear to comply with the autocratic command of Petrillo.

10. *Petitioners had not the necessary musical knowledge and skill to direct and control the means and manner of the performance of the sidemen.*

It does not appear that any of the petitioners possessed the requisite musical knowledge and skill necessary to direct any of the orchestras in the playing of its particular music. Roy Bartels was not a musician and could not prepare a musical arrangement. (R. 58) The lack of such

knowledge and skill is further evidence that the petitioners did not have the right to control the means and manner of the performance of the sidemen. In *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Nebr.), Judge Donohoe observed that "the hotel management were without training or natural talents, and were unskilled in the musical profession." Other respected courts are in accord. *United States v. Aberdeen Aerie No. 24*, 148 F. 2d 655 (C.C.A. 9th); *In re Barnaba Photographs*, 263 App. Div. 915, 32 N.Y.S. 2d 347.

C.

The accumulative effect of the evidence is overwhelming proof that the leaders had and exercised the right of control over the orchestra members.

The findings of fact of the district court on the question of right of control should have been sustained by the Circuit Court of Appeals because any one or two or three of the matters of fact reviewed in the foregoing subdivisions 1 to 10 amply support such findings. Certainly a mere fraction of the proof arrayed at the trial fully satisfies the requirement of "substantial evidence" to sustain the district court findings. Above and beyond that minimum requirement, this record comprises a consistent and full showing of the leaders as possessing and exercising every conceivable vestige and indicia of an employer and the establishment owners as possessing and exercising none. In reaching this same conclusion, Circuit Judge Gardner, in his dissenting opinion (R. 707, 708) said:

> "The evidence is clear and convincing that the leaders exercised complete control of the means and manner of performance. They and they alone had the right to hire and fire; they and they alone determined the wages of the sidemen; and they and they alone

actually paid the sidemen. The leaders were conducting an enterprise for profit, building up a name and reputation for themselves and their orchestras. The findings of the trial court that the leaders were in fact the employers is sustained not only by substantial evidence but by convincing proof. In fact, a finding that the contract correctly reflected the relationship of the parties would, I think, find no support in the evidence. No case could more convincingly illustrate an agreement which purported to create a certain relationship while the actual conduct and operation of the parties established another."

Petitioners submit that the accumulative effect of the record reviewed in the foregoing pages is overwhelming proof of the correctness of Judge Gardner's conclusion and hence the court below was clearly in error in holding that the evidence was insufficient to support the findings of the trial court.

As previously mentioned the unrealistic position of the Commissioner in cases involving the Form B contract and similar earlier forms has caused an avalanche of litigation and a wealth of court decisions on the identical question presented here. This court being committed to the doctrine that "substantial evidence" sufficient to sustain the findings of the trier of fact is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (p. 47, supra), it is exceedingly significant that, throughout the length and breadth of the country, the minds of courts and juries have uniformly and consistently come to the same conclusion as that reached by the district court and Judge Gardner. In many of these cases the evidence was relatively fragmentary and established comparatively few of the ten separate kinds of proof of existence of employment relation between the leaders and their sidemen which are presented in this case. The Commissioner was a party in many of these cases and arguments similar to the respondents in this case addressed to

the courts in the many like cases have achieved a composite batting average of exactly zero. The federal court cases to which we refer are as follows:

Spillson v. Smith, 147 F. 2d 727 (C.C.A. 7th).

Williams v. United States, 126 F. 2d 129, certiorari denied, 317 U. S. 655, 63 S. Ct. 52, 87 L. Ed. 527.

Nebraska National Hotel Company v. O'Malley, 63 F. Supp. 26 (Neb.).

Biltgen v. Reynolds, 58 F. Supp. 909 (Minn.).

Los Angeles Athletic Club v. United States, 54 F. Supp. 702 (S. D. Cal.), appeal dismissed 144 F. 2d 352 (C.C.A. 9th).

Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. United States, 50 F. Supp. 734 (Wash.) appeal dismissed 142 F. 2d 462 (C.C.A. 9th).

Longo, d/b/a Biffy Night Club v. Glenn, (W. D. Ky.) (Not officially reported).

In Re Ten Eyck Co., Inc., 41 F. Supp. 375 (N. D. New York).

The state court cases are as follows:

Seattle Aerie No. 1, etc. v. Commissioner of Unemployment Compensation, 23 Wash. 2d 167, 160 P. 2d 614.

Palmer et al. v. Michigan Unemployment Compensation Commission, 310 Mich. 702, 18 N. W. 2d 83.

Hill Hotel Co. v. Kinney, 138 Neb. 760, 295 N. W. 397.

Unemployment Compensation Commission v. Matheus, 56 Wyo. 479, 111 P. (2d) 111.

In re Earle, 262 App. Div. 789, 27 N.Y.S. (2d) 310, aff'd by New York Court of Appeals, 36 N. E. (2d) 453.

In Re Brown, 260 App. Div. 972, 23 N.Y.S. (2d) 330.

Claim of Miller, 29 N.Y.S. (2d) 15 (S. Ct. App. Div.).

People v. Grier, 53 Cal. App. 2d 841, 128 Pac. (2d) 207.

Commonwealth v. Adelphia Hotel Co., Pa. Com. Pleas Court, Feb. 24, 1942.

In Re Muni, 44 N.Y.S. 2d 924 (New York App. Div.).

In Re Jermyn Hotel Company (Pa. Common Pleas, Sept. 3, 1946) C.C.H. Unemployment Service, Pa. par. 8149.

Each of the above cited cases deals with the exact question which constitutes the crucial issue of this case. It is submitted that those cases conclusively establish the law to be that, under the facts here involved, the establishment owner is not the employer of the orchestra leader and his sidemen and the decision of the Circuit Court of Appeals in the present cases is in error and should be reversed by this court.

III.

The Circuit Court of Appeals substituted its findings of fact for those of the district court on the question of whether the parties actually intended that the right of control over the services of the orchestra members should be in the ballroom owners and not the leader.

The majority opinion admits the parol evidence rule left petitioners "free to prove by parol, if the facts so were, that instead of the agreement having been that the legal right of control of the leader's and the orchestra members' services should be given to the ballroom operators, the agreement actually was that it would remain in the leader, or that the parties had never in fact undertaken to agree as to who should have the legal right to control." (R. 690) The opinion then proceeds to weigh the evidence and makes clear cut findings of fact in language as follows:

"The evidence, however, in our opinion, fails to establish either of these situations in relation to the negotiation and execution of the contract. To the contrary it shows that, when the 'Form B' contract initially was presented to the ballroom operators in engaging the services of an orchestra, they had objected to the provision giving them the legal right of control and making them employers, until they were told that this was the only basis on which they could obtain the services of the orchestra, and that they thereupon executed the contract and each of the other contracts thereafter and accepted the services of the various orchestras under them. On these facts we think it must be held that the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members and so had created the common-law relation of employer and employee between them, at the time the contracts were executed at least." (R. 691)

Petitioners submit that foregoing finding of fact that "the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members" is directly contrary to the third finding of fact of the district court as follows:

"3. At the time of the execution of the contracts, Form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestra or any of the sidemen, or the method or manner of doing its or their work in any particular." (R. 663)

There was not only substantial but abundant evidence to sustain this finding in the undisputed testimony of one of the petitioners that when he objected to the references to him as an employer in one of the first Form B contracts presented to him, he was told by the booking agency which represented the leader in negotiating the transaction and which booked a number of later orchestra engagements at the Crystal Ballroom that the Form B contract was just a change that had been requested by Petrillo and that it would not change his status a bit. (R. 116) The finding is further supported by this same petitioner's testimony that he knew that certain by-laws of the musicians' union incorporated in the Form B contract by express reference referred to the leader as the employer of the sidemen (R. 120); that he didn't believe the Form B contract changed his status with the orchestra from what it had been before (R. 121); that he never understood that the terms of the contract were such that he assumed the obligations of an employer to the sidemen and the leader of the orchestra (R. 121); that in signing all the contracts he denied he was the employer (R. 122); and he never believed before or after the Form B contract that he had the right to give directions or instructions to the leader and sidemen of an orchestra in its performance of an engagement. (R. 102, 103)

Further evidence supporting the finding is the undisputed record fact that at the time the Form B contract was signed no new and different arrangement or contract was made between the leader and his booking agent, and that the then existing booking contract repeatedly referred to the employer and employee relationship between the leader and members of his orchestra. (R. 444, 445, Pltfs.' Ex. N, R. 461-467, 455, 556) Still further supporting evidence consisted of testimony of the leaders that the manner in which the orchestras operated and the conduct and

practice of the parties were the same after the Form B contract as they were before (R. 139, 253, 277, 327, 364, 365), and the testimony of one of the leaders that he did not permit an establishment owner to direct the sidemen of his orchestra at any time during the period when its engagements involved herein were played. (R. 139)

In addition to this direct evidence supporting the district court's above mentioned finding there was also clear and convincing circumstantial evidence reviewed earlier herein (pages 48 to 76) conclusively establishing that each leader at all times did the hiring and discharging of the sidemen in his orchestra, fixed and determined the amount and manner of payment of their wages, directed and controlled their performances in the playing of an engagement, furnished the tools with which the work was done, was engaged in an independent business for profit, and was recognized as the employer by the by-laws made a part of the Form B contract, from which evidence the district court could reasonably infer that the leader intended to exercise all the prerogatives of an employer including the right of control notwithstanding his execution of the B contract. Circuit Judge Gardner was of the opinion that this evidence was not only substantial but abundant to sustain the findings of the district court and that a finding that the contract correctly reflected the relationship of the parties would find no support in the evidence. (R. 708)

The majority opinion entirely disregards this abundant evidence sustaining the district court's finding No. 3 and instead singles out to sustain its own conflicting finding on the same question of ultimate fact one bit of evidence to the effect that when the Form B contract was first presented to the ballroom operators they had objected to the Form B contract until they were told that was the only basis on which they could obtain the orchestra and thereupon executed the contract. (R. 691) The majority opin-

ion wholly ignores one very significant fact which materially changes the whole import of this evidence, namely that in the same conversation with a leader's booking agent in which the ballroom owners were given this information, they were also told by such agent to go ahead and sign the contract, that it was just a change that had been requested by Petrillo, that it would not give the ballroom owners any more power than they had before and that it would not change their status a bit. (R. 116) In this same connection petitioners here point out that the only contracts which petitioners intended to sign were contracts containing by-laws which they knew made the leader the employer of his sidemen (R. 118, 120) and if these by-laws were not then a part of the contract which is what the majority opinion holds (R. 695, 696), then obviously there was no meeting of minds so as to create any contract for each of the engagements in question, and this fact standing alone is sufficient to sustain the district court's third finding.

In an endeavor to strengthen its finding that the parol evidence showed that the parties specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members, the court below found that the conduct of the parties after its execution of the Form B contract showed that the right of control "did have not merely a legal but a practical reality as well." (R. 693) This finding conflicts squarely with the district court's first finding "that at all times and during the times of the performances by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work" (R. 662) and its second finding that "there was no difference in the conduct and control of the orchestras, or the right to so conduct and control such or-

chestras, subsequent to June, 1941 than there was before that time." (R. 663) The substantial evidence sustaining these two findings is reviewed on pages 48 and 49 and pages 34 and 72 of this brief and for that reason will not be repeated here.

Petitioners submit that since the findings of the trial court on the matters in question were supported by substantial evidence, the Circuit Court was without authority to weigh the evidence and substitute its own findings for those of the district court, and its action in so doing was error under the well settled rule of this court.

McCaughn v. Real Estate Land, Title & T. Co., 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879.

United States v. Jefferson Elec. Mfg. Co., 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.

Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356.

IV.

The terms of the Form B contract were not sufficient to create the relationship of employer and employee between the ballroom owners and the leaders and the members of their orchestras.

The decision of the court below that the Form B contract establishes on its face the legal relationship of employer and employee is based entirely on the assumption that its recital dealing with the right of control over the orchestra's services had the legal effect of vesting in the ballroom owners the right to control the means and manner of the performance of the orchestra members. Petitioners submit that a proper analysis of the exact language of such recital in the light of other provisions in the contract shows this assumption to be wholly unwarranted. That language clearly states that the services over which

control is granted are "the services to be rendered under the specifications of this contract." The only specifications of the contract are: (1) the place where the services are to be rendered, (2) the date on which they are to be performed, and (3) the duration of the same. These three specifications *are all matters pertaining to results to be accomplished. There is not a single specification in the Form B contract regarding the details of the work to be performed by the individual orchestra members.*

The manner of performance of their work not being "a specification of the contract" the contract provision as to control actually negatives rather than establishes an employment relationship between the sidemen and the ballroom proprietors. However viewed, the provision referred to is too indefinite to permit the interpretation that it granted control over the details of the work to be performed by the musicians under the contract. It cannot, by any stretch of the imagination, be said to have granted to petitioners the right of directing how or in what manner the sidemen in the orchestra should actually perform their services. In taking exactly this view of a similar provision of a written contract involved in the case of *Humpton v. Unterkircher & Sons*, 97 Iowa 509, 66 N. W. 776, the Supreme Court of Iowa said:

> "It is true that each contract provides that the work was to be done under the direction of the defendants, and their architect, and to their entire satisfaction, approval, and acceptance; but it is manifest that this direction, approval, and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed, or who discharged. They had the right, under their contracts, to say what should be

done, but not how it should be brought about, or who should do it.

> "Appellant relies largely upon the use of the word 'direction' as employed in the contracts referred to. We do not regard this as in any sense conclusive. When we look at the whole contract, it is apparent that the only direction the architect or the owner could give, was, as to what should be done to accomplish the ends aimed at by the contract. He could not dictate the means or methods to be employed. This is the interpretation which has uniformly been placed upon such contracts."

In this connection, attention is again directed to the Federation's by-laws expressly made a part of the Form B contract. These by-laws nullify, contradict and completely abrogate the provision in the Form B contract insofar as it does purport to vest in the establishment owner the right to control the services of the orchestra members.

It should be further noted that the Form B contract does not even purport to divest the leader of some of the characteristic controls of an employer. By the terms of the Form B contract the leader clearly retains the right to select each sideman of the orchestra because the leader specifies who the musicians are to be and, even after the signing of the contract for the engagement, the leader can wait until the date of the engagement before giving the establishment a list of the sidemen whom he has selected. Furthermore, under the language of the Form B contract, even after the leader has supplied a list of the musicians, he still has the right to change and replace the personnel after the engagement begins. This was pointed out by Judge Donohoe in *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Neb.). After referring to the provisions of the Form B contract respecting control, he said:

> "In addition to this provision, we observe a further provision in the contract which purports to repose in

> the leader of the band or orchestra, in effect, the right to hire and fire; that is, by giving him the right to select and discharge the performers; in other words, a transfer back to the leader of a part, at least, of the supervision or direction which the other terms of the contract attempt to impose in the hotel or its manager."

There are still other striking deficiencies in the Form B contract which would have to be considered if it were to be looked upon as determinative evidence. Other than the establishment, there are no other signatory parties except the leader or his booking agent. No provision is made for any sideman's signature on the contract. It is the leader who specifies on the contract the amount of pay to be received by each member of the orchestra and therefore has, on the face of it, the right to control that matter.

On the ground that the terms of the Form B contract made no change with respect to who selects the members of an orchestra and fixes and determines their compensation, the National War Labor Board in the *Matter of Hotel Ass'n of New York City, Inc. and American Federation of Musicians* (September 26, 1945) held that the members of "name" orchestras were not the employees of certain New York City Hotels for wage stabilization purposes. Included among such orchestras was the orchestra of Griff Williams, one of the interveners herein.

It, therefore, appears that even if this court were to disregard the many record facts showing the true relationship of the parties and instead confine itself to the terms of the Form B contract, the decision of the Circuit Court of Appeals should be reversed and the decision of the district court upheld for the reason that those terms were not sufficient to vest in the ballroom owners the right to control the manner and means of the performance of the orchestra members.

CONCLUSION.

It is submitted that a clear and realistic analysis of the undisputed facts showing the true relationships in each of the pending cases reveals that the ballroom owners were not the employers of the leaders and members of the orchestras and that instead the leaders were the employers of the members of their respective orchestras and responsible for the taxes imposed on employers by the Federal Insurance Contributions Act and Federal Unemployment Tax Act. What Congress has commanded to be taxed must be taxed. No contract framer's sleight of hand or other superficial device can becloud or hide the true picture of the actual relationships which prevailed in these cases. The decision of the Circuit Court of Appeals is based on untenable grounds and should be reversed by this court.

Respectfully submitted,

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APPENDIX A.

STATUTES AND REGULATIONS.

Section 1426 of the Internal Revenue Code, as amended by Section 606 of Social Security Act Amendments of 1939 (26 U. S. C., Sec. 1426): "DEFINITIONS.

* * * * * * * *

"(b) *Employment.* The term 'employment' means * * * any service, of whatever nature, performed * * * by an employee for the person employing him." * * *

* * * * * * * * *

The definition of employment in Section 1607 (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939, is identical.

Treasury Regulations 106, pertaining to the Federal Insurance Contributions Act:

"Sec. 402.204. *Who are employees.* Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

"Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another

merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

"Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

"Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act * * *"

Treasury Regulations 107, Section 403.204, pertaining to the Federal Unemployment Tax Act, are identical.